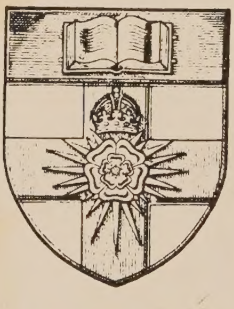
UNIVERSITY OF LONDON LIBRARY

THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

346.4
Mx. North
Reference only



UNIVERSITY OF LONDON
LIBRARY

Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-chancery-division_1875-1876_2

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

Members of the Council.

Chairman—JOSEPH BROWN, Esq., Q.C.

EX-OFFICIO MEMBERS.

SIR JOHN HOLKER, Knt., M.P. . .	ATTORNEY-GENERAL.
SIR HARDINGE S. GIFFARD, Knt. . .	SOLICITOR-GENERAL.

ELECTED MEMBERS.

MR. SERJEANT SIMON, M.P. MR. SERJEANT PULLING	Serjeants' Inn.
W. B. GLASSE, ESQ., Q.C. JOHN PEARSON, ESQ., Q.C.	Lincoln's Inn.
WILLIAM FORSYTH, Esq., M.P., Q.C. JAMES FITZJAMES STEPHEN, Esq., Q.C.	Inner Temple.
JOSEPH BROWN, Esq., Q.C. ALFRED WILLS, Esq., Q.C.	Middle Temple.
JOHN A. RUSSELL, Esq., Q.C. WILLIAM CRACROFT FOOKS, Esq., Q.C.	Gray's Inn.
WILLIAM WILLIAMS, Esq. (Firm—Messrs. Currie and Williams), Lincoln's Inn Fields W. S. COOKSON, Esq. (Firm—Messrs. Cookson, Wainewright, & Pennington), 6, New Square, Lincoln's Inn	Incorporated Law Society

Secretary—JAMES THOMAS HOPWOOD, Esq., 10, Old Square, Lincoln's Inn.

THE

LAW REPORTS.

Division I.—Chancery.

CASES

DETERMINED BY THE

CHANCERY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

CHIEF JUDGE IN BANKRUPTCY

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE CHANCERY DIVISION AND THE CHIEF JUDGE

AND IN

LUNACY.

Edited by **GEORGE WIRGMAN HEMMING, Q.C.**

VOL. II.

1875-76.—XXXIX VICTORIÆ.

LONDON:

Printed for the Incorporated Council of Law Reporting for England and Wales,

BY WILLIAM CLOWES AND SONS,

DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.

PUBLISHING OFFICE, 51, CAREY STREET, LINCOLN'S INN, W.C.

1876.

BIBL. LONDIN UNIV.

BIBL.
LONDIN.
UNIV.

NAMES OF REPORTERS.

COURT OF APPEAL . .	CHARLES MARETT, H. CADMAN JONES, MARTIN WARE,	*Barristers-at-Law.*
MASTER OF THE ROLLS .	J. H. FORDHAM, JAMES STIRLING,	*Barristers-at-Law.*
V.-C. MALINS . . .	T. W. GUNNING, W. E. M. TOMLINSON,	*Barristers-at-Law.*
V.-C. BACON . . .	J. B. DAVIDSON, F. G. A. WILLIAMS,	*Barristers-at-Law.*
V.-C. HALL	T. F. MORSE, W. WORSLEY KNOX,	*Barristers-at-Law.*
C. J. BACON	WM. LLOYD CABELL,	*Barrister-at-Law.*

Lord Cairns,	*Lord Chancellor.*
Sir George Jessel,	*Master of the Rolls.*
Sir William Milbourne James,	*Ordinary Judges of Court of Appeal.*
Sir George Mellish,	
Sir Richard Baggallay,	
Sir Richard Malins,	*Vice-Chancellors.*
Sir James Bacon,	
Sir Charles Hall,	
Sir John Holker,	*Attorney-General.*
Sir Hardinge Stanley Giffard,	*Solicitor-General.*

ERRATUM.

Page	*Line*	*For*	*Read*
750	22	s. 713	s. 71

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

PAGE

Abud *v.* Riches – – – 528
Agar *v.* George – – – 706
Anderson *v.* Bank of British Columbia – – – – 644
Appleby, *In re. Ex parte* Brown 799
Attorney-General *v.* St. John's Hospital, Bath – – – 554
——— *v.* Sunderland (Corporation of) – – – 634

B.

Bank of British Columbia, Anderson *v.* – – – – 644
Banner, *Ex parte. In re* Tappenbeck – – – – – 278
Beane, Shephard *v.* – – – 223
Bell, Jenney *v.* – – – 547
—— *v.* Turner – – – 409
Berkeley, Wollaston *v.* – – 213
Bestwick, *In re. Ex parte* Bestwick – – – – – 485
Bettws Llantwit Colliery Company, Boyle *v.* – – – 726
Birmingham and Midland Land and Investment Corporation, Vallance *v.* – – – – 369
Bolton *v.* Bolton – – – 217
Bonhote, Johnasson *v.* – – 298
Boyle *v.* Bettws Llantwit Colliery Company – – – 726
Brackenbury *v.* Gibbons – – 417
Bradford Tramways Company, *In re* – – – – – 373
Broder *v.* Saillard – – – 692
Brooker, *Ex parte. In re* Fastnedge – – – – 57
Brown, *Ex parte. In re* Appleby 799
Buckingham, *In re* – – – 696
Budd, Malmesbury Railway Company *v.* – – – 113
Burton *v.* Sturgeon – – – 318
Butt, Lascelles *v.* – – – 588

C.

Caldwell *v.* Pagham Harbour Reclamation Company – – 221
Campbell *v.* Compagnie Générale de Bellegarde. *In re* Compagnie Générale de Bellegarde – – – – 181
Carter, *Ex parte. In re* Carter – 806
Cashin *v.* Craddock – – – 140
Clarke *v.* Cookson – – – 746
Cluff *v.* Cluff – – – – 222
Cogan *v.* Duffield – – – 44
Collie, *In re. Ex parte* Smith – 51
Compagnie Générale de Belle-

PAGE

garde, Campbell *v.* *In re* Compagnie Générale de Bellegarde – – – – 181
Conibeer, *In re.* *Ex parte* Huxtable – – – – 54
Cook *v.* Dey – – – – 218
—— *v.* Enchmarch – – – 111
Cookson, Clarke *v.* – – – 746
Cooper *v.* Cooper – – – 492
Corcoran, Witt *v.* – – – 69
Cox, White *v.* – – – 387
Craddock, Cashin *v.* – – 140
Crane *v.* Jullion – – – 220
Crossley *v.* Tomey – – – 533
Crowther, Marshall *v.* – – 199

D.

Dalzell, *In re.* *Ex parte* Rashleigh – – – – – 9
Davey, Harry *v.* – – – 721
Davies, Roe *v.* – – – 729
Davis, *Ex parte.* *In re* Russ – 231
Dawson *v.* Oliver-Massey – 753
Day *v.* Gudgen – – – 209
Debenham, Morris *v.* – – 540
————, Theed *v.* – – 165
Deighton's Settled Estates, *In re* 783
Dey, Cook *v.* – – – – 218
Dickinson *v.* Dodds – – – 463
Dillon, Grills *v.* – – – 325
Disney *v.* Longbourne – – 704
Dixon, *In re.* *Ex parte* Shepherd 430
Dodds, Dickinson *v.* – – 463
Duffield, Cogan *v.* – – – 44

E.

Ecclesiastical Commissioners and the Marquis of Salisbury, *In re* 29
Eckersley, Taylor *v.* – – 302
Edwards *v.* Edwards – – 291
————, Lysaght *v.* – – 499
Elliott, *Ex parte.* Middleton *v.* Pollock – – – – 104
Ellis, *Ex parte.* *In re* Ellis – 797
——, *In re.* *Ex parte* Thoday – 229
Enchmarch, Cook *v.* – – 111
Evans, Jones *v.* – – – 420
Everall, Holt *v.* – – – 266
Eyre *v.* Hughes – – – 148

F.

PAGE

Fane *v.* Fane – – – – 711
Fastnedge, *In re.* *Ex parte* Brooker – – – – 57
Finch *v.* Underwood – – 310

G.

Gaslight and Coke Company, Patterson *v.* – – – 812
Gaskell, *Ex parte.* *In re* Manchester and Leeds Railway Company – – – – 360
General South American Company, *In re* – – – 337
George, Agar *v.* – – – 706
Gibbons, Brackenbury *v.* – – 417
Gilbert *v.* Smith – – – 686
Great Western Railway Company *v.* Smith – – – 235
Grills *v.* Dillon – – – 325
Grimoldby (Rector of), *Ex parte.* *In re* Louth and East Coast Railway Company – – 225
Gudgen, Day *v.* – – – 209

H.

Hankin *v.* Kilburn. *In re* Tootal's Estate – – – 628
Harris, *Ex parte.* *In re* Lewis 423
Harry *v.* Davey – – – 721
Hartmont, Phosphate Sewage Company *v.* – – – 811
Hastie *v.* Hastie – – – 304
Hereford and South Wales Waggon and Engineering Company, *In re* – – – 621
Heritage *v.* Paine – – – 594
Hickley *v.* Hickley – – 190
Hickman *v.* Upsall – – 617
Hodges *v.* Hodges – – – 112
Hodgson *v.* Jex – – – 122
Holt *v.* Everall – – – 266
Hughes, Eyre *v.* – – – 148
Huxtable, *Ex parte.* *In re* Conibeer – – – – – 54

I.

International Life Assurance Society, *In re* – – – 476
Irlam *v.* Irlam – – – 608

J.

PAGE

Jenney *v.* Bell – – – 547
Jex, Hodgson *v.* – – – 122
Johnasson *v.* Bonhote – – 298
Jones, *In re* – – – – 70
——— and Metropolitan Bank, *In re* – – – – – 366
——— *v.* Evans – – – 420
Jones' Will, *In re* – – – 362
Jullion, Crane *v.* – – – 220

K.

Kilburn, Hankin *v.* *In re* Tootal's Estate – – – 628
King, *Ex parte.* *In re* King – 256

L.

Lambert, Taylor *v.* – – – 177
Lascelles *v.* Butt – – – 588
Leslie's Settlement Trusts, *In re* 185
Letchford, *In re* – – – 719
Lewis, *In re.* *Ex parte* Harris 423
Lisbon Steam Tramways Company, *In re* – – – 575
Lister, *In re.* *Ex parte* Simmons 749
Longbourne, Disney *v.* – – 704
Louth and East Coast Railway Company, *In re.* *Ex parte* Rector of Grimoldby – – 225
Louth and East Coast Railway Company, Sharpley *v.* – – 663
Lynch, *Ex parte.* *In re* Lynch 227
Lysaght *v.* Edwards – – 499

M.

McKay's Case. *In re* Morvah Consols Tin Mining Company 1
Malmesbury Railway Company *v.* Budd – – – – 113
Manchester and Leeds Railway Company, *In re.* *Ex parte* Gaskell – – – – 360
Marsden, *Ex parte.* *In re* Marsden – – – – – 786
Marshall *v.* Crowther – – 199
Metropolitan Bank and Jones, *In re* – – – – – 366
Mew, *In re.* *Ex parte* Pearce – 320

PAGE

Middleton *v.* Pollock. *Ex parte* Elliott – – – – 104
Moore, *Ex parte.* *In re* Stokoe 802
Morgan, *Ex parte.* *In re* Simpson – – – – – 72
Morris *v.* Debenham – – 540
Morvah Consols Tin Mining Company, *In re.* McKay's Case – – – – – 1
Muirhead, *Ex parte.* *In re* Muirhead – – – – – 22

N.

Nassau Phosphate Company, *In re* 610
Native Iron Ore Company, *In re* 345
Neath and Brecon Railway Company, *Ex parte* – – – 201

O.

Oliver-Massey, Dawson *v.* – 753

P.

Padwick *v.* Scott. *In re* Scott's Estate. Scott *v.* Padwick – 736
———, Scott *v.* *In re* Scott's Estate. Padwick *v.* Scott – 736
Page, *In re.* *Ex parte* Page – 323
Pagham Harbour Reclamation Company, Caldwell *v.* – – 221
Paine, Heritage *v.* – – – 594
Pares, *In re* – – – – 61
Patterson *v.* Gaslight and Coke Company – – – – 812
——— *v.* Wooler – – 586
Pearce, *Ex parte.* *In re* Mew – 320
Peek *v.* Trinsmaran Iron Company – – – – – 115
Percy & Kelly Nickel, Cobalt, and Chrome Iron Mining Company, *In re* – – – 531
Phosphate Sewage Company *v.* Hartmont – – – – 811
Pilgrim, Smith *v.* – – – 127
Pollock, Middleton *v.* *Ex parte* Elliott – – – – 104
Prideaux, Sweeting *v.* – – 413
Pryer, Worraker *v.* – – 109

R.

PAGE

Rashleigh, *Exparte. In re* Dalzell 9
Rathbone, *In re* – – – 483
Rector of Grimoldby, *Ex parte. In re* Louth and East Coast Railway Company – – 225
Reiner *v.* Salisbury (Marquis of) 378
Riches, Abud *v.* – – – 528
Roden, Underhill *v.* – – 494
Roe *v.* Davies – – – 729
Russ, *In re. Ex parte* Davis – 231
Russell, *Ex parte. In re* Winn 424
——— *v.* St. Aubyn – – 398

S.

Saillard, Broder *v.* – – – 692
St. Aubyn, Russell *v.* – – 398
St. John's Hospital, Bath, Attorney-General *v.* – – – 554
St. Thomas' Dock Company, *In re* 116
Salisbury (Marquis of) and the Ecclesiastical Commissioners, *In re* – – – – – 29
Salisbury (Marquis of), Reiner *v.* 378
Scott, Padwick *v. In re* Scott's Estate. Scott *v.* Padwick – 736
Scott's Estate, *In re.* Padwick *v.* Scott. Scott *v.* Padwick – 736
Sellon, Venour *v. In re* Venour's Settled Estates – – – 522
Sharpley *v.* Louth and East Coast Railway Company – – 663
Shephard *v.* Beane – – – 223
Shepherd, *Ex parte. In re* Dixon 430
Shubrook, *Ex parte. In re* Witt 489
Simmons, *Ex parte. In re* Lister 749
Simpson, *In re. Ex parte* Morgan 72
Singer Manufacturing Company *v.* Wilson – – – – 434
Smith, *Ex parte. In re* Collie – 51
———, Gilbert *v.* – – – 686
———, Great Western Railway Company *v.* – – – 235
——— *v.* Pilgrim – – – 127
———, Wilson *v.* – – – 67
South Wales Atlantic Steamship Company, *In re* – – – 763
Stead's Mortgaged Estates, *In re* 713
Stockton Malleable Iron Company, *In re* – – – – 101
Stokoe, *In re. Ex parte* Moore – 802
Sturgeon, Burton *v.* – – 318

PAGE

Sunderland (Corporation of), Attorney-General *v.* – – 634
Sweeting *v.* Prideaux – – 413

T.

Tappenbeck, *In re. Ex parte* Banner – – – – 278
Taylor *v.* Eckersley – – 302
——— *v.* Lambert – – – 177
Theed *v.* Debenham – – 165
Thoday, *Ex parte. In re* Ellis – 229
Tomey, Crossley *v.* – – – 533
Tootal's Estate, *In re.* Hankin *v.* Kilburn – – – – 628
Trinsmaran Iron Company, Peek *v.* 115
Turner, Bell *v.* – – – 409

U.

Underhill *v.* Roden – – 494
Underwood, Finch *v.* – – 310
Upsall, Hickman *v.* – – 617

V.

Vallance *v.* Birmingham and Midland Land and Investment Corporation – – – 369
Vane *v.* Vane – – – 124
Varah, Wake *v.* – – – 348
Venour *v.* Sellon. *In re* Venour's Settled Estates – – – 522
Venour's Settled Estates, *In re.* Venour *v.* Sellon – – – 522

W.

Waddell's Contract, *In re* – 172
Wake *v.* Varah – – – 348
Walter, *Ex parte. In re* Webb 326
Watson, *Ex parte. In re* Watson 63
Webb, *In re. Ex parte* Walter – 326
White *v.* Cox – – – – 387
Wilson, Singer Manufacturing Company *v.* – – – 434
——— *v.* Smith – – – 67
Winn, *In re. Ex parte* Russell 424
Witt, *In re. Ex parte* Shubrook 489
—— *v.* Corcoran – – – 69
Wollaston *v.* Berkeley – – 213
Wooler, Patterson *v.* – – 586
Worraker *v.* Pryer – – – 109

TABLE OF CASES CITED.

A.

		PAGE
Achard *v.* Ring	31 L. T. (N.S.) 647	491
Adams *v.* Lindsell	1 B. & A. 681	465
——— *v.* Paynter	1 Coll. 530	175
Adansonia Fibre Company, In re	Law Rep. 9 Ch. 635	774
Agar *v.* Regent Canal Company	1 Sw. 250	670
Ainsworth *v.* Walmsley	Law Rep. 1 Eq. 518	449
Allhusen *v.* Whittle	Law Rep. 4 Eq. 295	199
Alton *v.* Harrison	Law Rep. 4 Ch. 622	106, 132
Anon.	1 Giff. 392	215
Archer *v.* Kelly	1 Dr. & Sm. 300	364
Armstrong *v.* Armstrong	3 My. & K. 45	81
Arnold *v.* Bradbury	Law Rep. 6 Ch. 706	828
Arnold's Trusts, In re	Law Rep. 10 Eq. 252	352
Ashby *v.* Ashby	7 B. & C. 444	743
Ashley's Case	Law Rep 9 Eq. 263	673
Ashton *v.* M'Dougall	5 Beav. 56	394
Ashworth, Ex parte	Law Rep. 18 Eq. 705	232, 330
Atcherley *v.* Du Moulin	2 K. & J. 186	708
Atherton *v.* British Nation Assurance Company	Law Rep. 5 Ch. 720	493
Attorney-General *v.* Bunce	Law Rep. 6 Eq. 563	560
——— *v.* Calvert	23 Beav. 248	561
——— *v.* Clifton	32 Beav. 596	573
——— *v.* Murdoch	7 Hare, 445	560
——— *v.* Pearson	7 Sim. 290	560
——— *v.* St. Cross Hospital	17 Beav. 435	560
Aylesford (Earl of) *v.* Morris	Law Rep. 8 Ch. 184	157
Aynsley *v.* Glover	Law Rep. 10 Ch. 283	167

B.

Badger *v.* Gregory	Law Rep. 8 Eq. 78	350
Baker *v.* Baker	6 H. L. C. 616	630
——— *v.* Lee	8 H. L. C. 495	561
——— *v.* London and South Western Railway Company	Law Rep. 3 Q. B. 91	655
Ball *v.* Ray	Law Rep. 8 Ch. 467	696
Bank of London Insurance Association, In re	Law Rep. 6 Eq. 421	777
Bank of South Australia *v.* Abrahams	Law Rep. 6 P. C. 265	339

		PAGE
Banner *v.* Johnston	Law Rep. 5 H. L. 157	805
Barclay's Case	26 Beav. 177	777
Barnes *v.* Bond	32 Beav. 653	199
Barrett *v.* Hartley	Law Rep. 2 Eq. 789	156
Barrow *v.* Barrow	18 Beav. 529	46
Baum, Ex parte	Law Rep. 9 Ch. 673	66
Bawnem Iron Company *v.* Barnett	8 C. B. 406	616
Bayley *v.* Cass	10 W. R. 370	138
Beard *v.* Egerton	8 C. B. 165	828
Bective (Countess of) *v.* Hodgson	10 H. L. C. 656	418
Bell *v.* Bird	Law Rep. 6 Eq. 635	551
Bennett *v.* Moore	1 Ch. D. 692	687
Bentley *v.* Fleming	1 Car. & Kir. 587	829
Bertrand *v.* Davies	31 Beav. 429	156
Bethune *v.* Kennedy	1 My. & Cr. 114	630
Betts *v.* Menzies	10 H. L. C. 117	823
—— *v.* Walker	14 Q. B. 363	828
Beulah Park Estate, In re	Law Rep. 15 Eq. 43	774
Blackburn, Ex parte	Law Rep. 12 Eq. 358	133
———— *v.* Stables	2 V. & B. 367	47
Blagrave *v.* Routh	2 K. & J. 509; 8 D. M. & G. 620	154
Blake *v.* Blake	18 W. R. 944	385
Blandford (Marquis of) *v.* Marlborough (Duchess of)	2 Atk. 542	47
Bloomer *v.* Union Coal and Iron Company	Law Rep. 16 Eq. 383	339
Bock *v.* Gorrissen	30 L. J. (Ch.) 39	490
Bolland, Ex parte	Law Rep. 7 Ch. 24	77
Bonithon *v.* Hockmore	1 Vern. 316	154
Boraston's Case	3 Rep. 19 a	179
Botting, Ex parte	Law Rep. 19 Eq. 261	65
Bourne, Ex parte	2 Gly. & J. 137	426
Bovill *v.* Goodier	Law Rep. 1 Eq. 35	537, 828
—— *v.* Smith	Law Rep. 2 Eq. 459	537, 828
Bowles' Mortgage, Re	22 W. R. 817; 31 L. T. (N.S.) 365	131
Boyce *v.* Boyce	16 Sim. 476	757
Bradford (Earl of) *v.* Romney (Earl of)	30 Beav. 431	46
Braham *v.* Bustard	1 H. & M. 447	450
Braybroke (Lord) *v.* Inskip	8 Ves. 417	512
Brent *v.* Haddon	Cro. Jac. 555	696
Brett, Ex parte	1 Ch. D. 151	789
—— *v.* Beckwith	3 Jur. (N.S.) 31	777
—— *v.* Levett	13 East, 213	102
Bridport Old Brewery Company, In re	Law Rep. 2 Ch. 191	613
Brighton Hotel Company, In re	Law Rep. 6 Eq. 333	118
British Provident Life and Fire Assurance Society	4 D. J. & S. 407	339
Broad *v.* Selfe	9 Jur. (N.S.) 885	156
Brown *v.* Bateman	Law Rep. 2 C. P. 272	294
——— *v.* Kempton	19 L. J. (C.P.) 169	136
——— *v.* Lee	11 Beav. 379	528
Browne *v.* Browne	3 Sm. & Giff, 568	418
——— *v.* Hammond	Joh. 210	497
Browne's Will, In re	Law Rep. 7 Eq. 231	364
Browning, Ex parte	Law Rep. 9 Ch. 583	330
Burdick *v.* Garrick	Law Rep. 5 Ch. 453	493
Burford (Corporation of) *v.* Lenthall	2 Atk. 551	124
Burgess *v.* Burgess	3 D. M. & G. 896	450
Burnham *v.* Bennett	2 Coll. 254	215

C.

		PAGE
Caddick's Settled Estates, Re	7 W. R. 334	39
Caldwell *v.* Fellowes	Law Rep. 9 Eq. 410	708
Caledonian Railway Company *v.* Sprot	2 Macq. 449	237
Campbell *v.* Compagnie Générale de Bellegarde	2 Ch. D. 181	728
Cannot *v.* Morgan	1 Ch. D. 3	747
Carpenter, In re	Kay, 418	502
Carter *v.* Carter	Law Rep. 8 Eq. 551	708
Cavendish *v.* Cavendish	Law Rep. 10 Ch. 319	543
Chambers, In re	28 Beav. 653	525
——— *v.* Goldwin	9 Ves. 254	154
Chartered Bank of India *v.* Rich	4 B. & S. 73; 32 L. J. (Q.B.) 300	647
Chichester *v.* Coventry	Law Rep. 2 H. L. 71	402
City of London Brewery Company *v.* Tennant	Law Rep. 9 Ch. 212	167
Clark, In re	Law Rep. 1 Ch. 292	720
——— *v.* Freeman	11 Beav. 112	449
——— *v.* Lucy	5 Vin. Abr. 87	757
——— *v* Parker	19 Ves. 1	757
Clarke *v.* Clark	Law Rep. 1 Ch. 16	167
——— *v.* Clarke	Law Rep. 3 P. & D. 57	23
Clinton's Trust, In re	Law Rep. 13 Eq. 295	364
Coates *v.* Coates	33 Beav. 249	715
Cobb *v.* Symonds	5 B. & A. 516	775
Cochrane *v.* Fearon	18 Jur. 568	532
Cockayne, Ex parte	Law Rep. 16 Eq. 218	329
Cocks *v.* Chandler	Law Rep. 11 Eq. 446	450
Codrington *v.* Lindsay	Law Rep. 8 Ch. 578	393
Cohen, Ex parte	Law Rep. 7 Ch. 20	53, 259
——— *v.* Wilkinson	12 Beav. 138; 1 Mac. & G. 481	670
Coker, Ex parte	Law Rep. 10 Ch. 652	53
Collett *v.* Collett	35 Beav. 312	755
Collins' Company *v.* Cowen	3 K. & J. 428	450
Colonial and General Gas Company, Re	23 L. T. (N.S.) 358	339
Cooke *v.* Oxley	3 T. R. 653	466
Cooper *v.* Blissett	1 Ch. D. 691	110
Corbett's Trusts, In re	Joh. 591	351
Cossey *v.* London, Brighton, and South Coast Railway Company	Law Rep. 5 C. P. 146	646
Courtenay *v.* Williams	3 Hare, 539	715
Cowen, Ex parte	Law Rep. 2 Ch. 563	324
Cox *v.* Dolman	2 D. M. & G. 592	619
Crane *v.* Price	1 Webs. Pat. Cas. 393; 4 My. & Cr. 580	829
Cresswell *v.* Haines	10 W. R. 121	502
Croft *v.* Day	7 Beav. 84	450
——— *v.* Graham	2 D. J. & S. 155	157
Croly *v.* Weld	3 D. M. & G. 993	633
Cruse *v.* Paine	Law Rep. 4 Ch. 441	600
Cuming, In re	Law Rep. 5 Ch. 72	502
Cunningham *v.* Antrobus	16 Sim. 436	215
Curling *v.* Perring	2 My. & K. 380	646

D.

Dalgleish's Settlement, In re	1 Ch. D. 46	484
Davies *v.* Davies	Law Rep. 9 Eq. 468	394

		PAGE
Davies *v.* Parry	1 Giff. 174	157
Davis *v.* Thomas	1 Russ. & My. 506	313
Daw *v.* Eley	Law Rep. 1 Eq. 38	828
Dawson *v.* Killett	1 Bro. C. C. 119	179
Deeze, Ex parte	1 Atk. 228	490
Defries *v.* Creed	34 L. J. (Ch.) 607	294
Dell *v.* King	33 L. J. (Ex.) 347	551
Dempsey, Ex parte	Law Rep. 8 Ch. 676	790, 799
Dent v. Auction Mart Company	Law Rep. 2 Eq. 238	167
Denton *v.* Macneil	Law Rep. 2 Eq. 552	672
Dering *v.* Kynaston	Law Rep. 6 Eq. 210	708
Devon and Somerset Railway Company, In re	Law Rep. 6 Eq. 610	339
Dewhurst, Ex parte	Law Rep. 8 Ch. 965	284
Dicconson *v.* Talbot	Law Rep. 6 Ch. 32	194
Dickinson *v.* Dilwyn	Law Rep. 8 Eq. 546	708
Doe *v.* Hopkinson	5 Q. B. 223	419
—— *v.* Nowell	1 M. & S. 327; 5 Dow. 202	419
—— *v.* Pyke	5 M. & S. 146	242
—— *v.* Wainewright	5 T. R. 427	352
Donisthorpe, In re	Law Rep. 10 Ch. 35	551
Dorin *v.* Dorin	Law Rep. 7 H. L. 568	352
Doss *v.* Secretary of State for India	Law Rep. 19 Eq. 509	382
Douthat, Ex parte	4 B. & A. 67	102
Dowling *v.* Dowling	Law Rep. 1 Ch. 612	415
Drake *v.* Trefusis	Law Rep. 10 Ch. 364	189, 524
Driver's Settlement, In re	Law Rep. 19 Eq. 352	484
Duffield *v.* Duffield	3 Bli. (N.S.) 260	418
Dunlop *v.* Higgins	1 H. L. C. 381	466
Duvergier *v.* Fellowes	1 Cl. & F. 39	775
Du Vigier *v.* Lee	2 Hare, 326	716

E.

Eales *v.* Drake	1 Ch. D. 217	633
East Gloucestershire Railway Company *v.* Bartholomew	Law Rep. 3 Ex. 15	673
Eaton *v.* Hewitt	2 Dr. & Sm. 184	497
Ebbs *v.* Boulnois	Law Rep. 10 Ch. 479	174
Edelsten *v.* Vick	11 Hare, 78	449
Edmunds *v.* Waugh	Law Rep. 1 Eq. 418	619, 714
Edwards, In re	Law Rep. 9 Ch. 97	708
——— *v.* Abrey	Cooper, C. P. 177	125
——— *v.* Coombe	Law Rep. 7 C. P. 519	486
——— *v.* Edwards	2 Ch. D. 291	303
——— *v.* Hancher	1 C. P. D. 111	486
Eley *v.* Positive Assurance Company	1 Ex. D. 20	776
Ellice *v.* Roupell	33 Beav. 308.	384
Elliot *v.* North Eastern Railway Company	10 H. L. C. 333	237
Ellis, Ex parte	2 Ch. D. 797	799
—— *v.* Silber	Law Rep. 8 Ch. 83	550
Elvy *v.* Norwood	5 De G. & Sm. 240	716
Engelback *v.* Nixon	Law Rep. 10 C. P. 645	426
English *v.* Tottie	1 Q. B. D. 141	655
Evans, In re	2 My. & K. 318	719
——— *v.* Carrington	2 D. F. & J. 481	319
——— *v.* Prothero	2 Mac. & G. 319; 1 D. M. & G. 572	83

		PAGE
Evans *v.* Scott	1 H. L. C. 43	180
Ewing *v.* Osbaldiston	2 My. & Cr. 53	776
Exeter (Bishop of) *v.* Ward (Lord)	2 My. & K. 54	125
Eyre *v.* Shaftesbury (Countess of)	2 P. Wms. 102	30
—— *v.* Wake	4 Ves. 795	125

F.

Falkland *v.* Bertie	2 Vern. 333	757
Family Endowment Society, In re	Law Rep. 5 Ch. 118	777
Farmer *v.* Compton	Rep. in Ch. 1	757
—— *v.* Mills	4 Russ. 86	630
Feise *v.* Wray	3 East, 93	285
Fenner *v.* London and South Eastern Railway Company	Law Rep. 7 Q. B. 767	655
Fenn's Case	4 D. M. & G. 285	777
Fernie *v.* Young	Law Rep. 1 H. L. 63	80
Festing *v.* Allen	12 M. & W. 279	419
Finnegan *v.* James	Law Rep. 19 Eq. 72	536, 824
Fisher, Ex parte	Law Rep. 7 Ch. 636	259
Fitzgerald, In re	2 Sch. & Lef. 432	124
—— *v.* Chapman	1 Ch. D. 563	319
Fitzhenry *v.* Bonner	2 Drew. 36	415
Ford, Ex parte	1 Ch. D. 521.	428
—— *v.* Chesterfield (Earl of)	16 Beav. 516.	211
—— *v.* Foster	Law Rep. 7 Ch. 611	449
Forster *v.* Abraham	Law Rep. 17 Eq. 351.	194
Foster, Ex parte	Law Rep. 10 Ch. 59	232
Freeman *v.* Lomas	9 Hare, 109	741
French *v.* Bacon	2 Atk. 120	154
Fripp *v.* Bridgewater and Taunton Canal Company	11 Hare, 421	115
Fulton *v.* Andrew	Law Rep. 7 H. L. 448	79
Fussell *v.* Dowding	Law Rep. 14 Eq. 421.	319

G.

Galloway *v.* Bleaden	1 Webs. Pat. Cas. 521	829
Gardner *v.* London, Chatham, and Dover Railway Company	Law Rep. 2 Ch. 201	339
Gaunt *v.* Fynney	Law Rep. 8 Ch. 8	697
General *v.* Sillem	10 H. L. C. 704	591
General Provident Assurance Company In re	Law Rep. 14 Eq. 507.	340
General South American Company, In re	2 Ch. D. 337.	347
Gibbs, Ex parte.	Law Rep. 10 Ch. 382.	329
Gilbert, Re	Cited 2 H. & M. 203	524
Gillebrand, Ex parte	Law Rep. 10 Ch. 52	77
Godfrey *v.* Littel	1 Russ. & My. 59	592
—— *v.* Watson	3 Atk. 517	154
Gomez, Ex parte	Law Rep. 10 Ch. 639.	281
Goold *v.* Teague	5 Jur. (N.S.) 116	502
Gordon, Ex parte	Law Rep. 8 Ch. 555	53
—— *v.* Adolphus	3 Bro. P. C. 306	496
Governors of St. Bartholomew's Hospital, Ex parte	Law Rep. 20 Eq. 369.	360

		PAGE
Graham *v.* Oliver	3 Beav. 124	543
——— *v.* Winterson	Law Rep. 16 Eq. 243.	551
Gray *v.* Turnbull	Law Rep. 2 H. L., Sc. 53	79
Graydon *v.* Hicks	2 Atk. 16	757
Great Northern Railway Company, Ex parte	5 Railw. Cas. 269; 16 Sim. 169	205
Great Western Railway Company *v.* Bennett	Law Rep. 2 H. L. 27	242
Green *v.* Farmer	4 Burr. 2214.	490
——— *v.* Green	2 J. & Lat. 529	757
——— *v.* Pulsford	2 Beav. 70	724
Greenough *v.* Gaskell	1 My. & K. 98	646
Grey *v.* Friar	4 H. L. C. 565	313
——— *v.* Pearson	6 H. L. C. 61	179
Griesley *v.* Chesterfield (Earl of).	13 Beav. 288.	199
Grisewood's Case	4 De G. & J. 544	777
Guthrie *v.* Fisk.	3 B. & C. 178	23

H.

Hackett *v.* Baiss	Law Rep. 20 Eq. 494.	167
Hadley *v.* London Bank of Scotland	3 D. J. & S. 63	508
Hall *v.* Barrows.	4 D. J. & S. 150	450
Halliday, Ex parte	Law Rep. 8 Ch. 283	132
Hallows *v.* Fernie	Law Rep. 3 Ch. 467	672
Hammersmith and City Railway Company *v.* Brand	Law Rep. 4 H. L. 171	250
Hare, Ex parte	Law Rep. 10 Ch. 218.	24
——— *v.* Burges	5 W. R. 585	313
Hargrove & Co., Ex parte	Law Rep. 10 Ch. 542.	613, 770
Harris *v.* Amery	Law Rep. 1 C. P. 148	776
Harris' Case	Law Rep. 7 Ch. 587	466
Hay's Case	Law Rep. 10 Ch. 593.	5
Hayward, Ex parte	Law Rep. 6 Ch. 546	102
Head *v.* Diggon.	3 Man. & Ry. 97	471
Heath *v.* Bucknall	Law Rep. 8 Eq. 1	167
Hebb's Case	Law Rep. 4 Eq. 9	467
Helliwell *v.* Dearman	1 Webs. Pat. Cas. 401, n.	829
Hemming *v.* Maddick	Law Rep. 9 Eq. 175	598
Hemmings *v.* Munckley	1 Bro. C. C. 304	757
Henderson *v.* Lacon	Law Rep. 5 Eq. 249	671
Herbert *v.* Sayer	5 Q. B. 965	809
Hertfordshire Brewery Company, In re	43 L. J. (Ch.) 358	774
Heymann *v.* European Central Railway Company	Law. Rep. 7 Eq. 154	673
Heys *v.* Astley	4 D. J. & S. 34	299
Hicks *v.* Sallett.	3 D. M. & G. 782	620
Higginson *v.* Blockley	4 W. R. 60	537
Hill *v.* Evans	4 D. F. & J. 288	829
Hills *v.* London Gaslight Company	5 H. & N. 312	829
Hindle *v.* Tayler	5 D. M. & G. 577	415
Hodgkin, Ex parte	Law Rep. 20 Eq. 746	132
Holderness *v.* Collinson	7 B. & C. 212	490
Holmes, Re	2 J. & H. 527	382
——— *v.* Cradock	3 Ves. 317	179
——— *v.* Powell	8 D. M. & G. 572	237
——— *v.* Prescott	10 Jur. (N.S.) 507	418
Hooper *v.* Gumm	2 J. & H. 602	655

		PAGE
Hope *v.* Carnegie	Law Rep. 4 Ch. 264	69
Howe *v.* Dartmouth (Earl of)	7 Ves. 137	630
Hughes, Ex parte	6 Ves. 616	194
Huguenin *v.* Baseley	14 Ves. 273	195
Humble *v.* Humble	2 Jur. 696	619
Humphries *v.* Carvalho	16 East, 45	466
Hunter *v.* Knockolds	1 Mac. & G. 640	716
Hurles' Settled Estates, Re	2 H. & M. 196	525
Hurry *v.* Morgan	Law Rep. 3 Eq. 152	352
Hutchison *v.* Skelton	2 Macq. 492	403
Hutton *v.* Simpson	2 Vern. 722	620
Hyde *v.* Skinner	2 P. Wms. 196	314

I.

Ilminster School Case	8 H. L. C. 495	572
Ireland *v.* Livingstone	Law Rep. 5 H. L. 395	286
Izard, Ex parte.	Law Rep. 9 Ch. 271	260

J.

James, Ex parte	8 Ves. 337	194
——— In re	Law Rep. 5 Eq. 334	30
——— *v.* May	Law Rep. 6 H. L. 328	598
Jennings *v.* Broughton	5 D. M. & G. 126	672
Jessop *v.* Blake	3 Giff. 639	319
Job *v.* Banister	2 K. & J. 374	313
Johnson *v.* Fesenmeyer	25 Beav. 88, 3 De G. & J. 18	133
Jones, Ex parte.	Law Rep. 16 Eq. 386	330
——— *v.* Chappell	Law Rep. 20 Eq. 539	698
——— *v.* Pearce	1 Webs. Pat. Cas. 121	829
Josephs *v.* Pebrer	3 B. & C. 639	775

K.

Kay *v.* Marshall	1 My. & Cr. 373	828
Kelk *v.* Pearson	Law Rep. 6 Ch. 809	167
Kemp, Ex parte	Law Rep. 9 Ch. 383	102
Kennedy *v.* Lee	3 Mer. 441	465
——— *v.* Panama, &c., Royal Mail Company	Law Rep. 2 Q. B. 580	672
Kennell *v.* Abbott	4 Ves. 802	319
Kensington (Lord) *v.* Bouverie	7 D. M. & G. 134	154
Kensingston Station Act, In re	Law Rep. 20 Eq. 197	624
Key *v.* Key	4 D. M. & G. 73	415
Kibble, Ex parte	Law Rep. 10 Ch. 373	228
King, Ex parte	Law Rep. 17 Eq. 332	66
———, Ex parte	2 Ch. D. 256	798
——— *v.* Corke	1 Ch, D. 57	155, 732
Knight *v.* Cameron	14 Ves. 389	755

L.

Lacon *v.* Liffen.	4 Giff. 75	260
Lafone *v.* Falkland Islands Company	4 K. & J. 34	646

		PAGE
Laing *v.* Reed	Law Rep. 5 Ch. 4	613
Lambert *v.* Lambert	Law Rep. 16 Eq. 320	199
Langham *v.* Nenny	3 Ves. 467	216
Langridge, Ex parte	19 W. R. 951	24
Laprimaudye *v.* Teissier	12 Beav. 206	47
Lassence *v.* Tierney	1 Mac. & G. 551	415
Lawes *v.* Bennett	1 Cox, 167	520
Lawless *v.* Mansfield	1 D. & War. 557	157
Leech *v.* Bolland	Law Rep. 10 Ch. 362	138
—— *v.* Schweder	Law Rep. 9 Ch. 463	167
Leeming *v.* Sherratt	2 Hare, 14	351
Legh, Ex parte	15 Sim. 445	719
Leith *v.* Irvine	1 My. & K. 277	156
Le Neve *v.* Le Neve	3 Atk. 646	295
Lennard, In re	1 Ch. D. 177	427
Leonard, Ex parte	Law Rep. 19 Eq. 209	790
Levi, Ex parte	34 L. J. (Bkcy.) 23	789
——, In re	Law Rep. 2 Ch. 493	800
Levy & Co., Ex parte	Law Rep. 11 Eq. 619	232, 330
Lewes, In re	1 Mac. & G. 23	71
Lewis *v.* Duncombe	29 Beav. 175	619, 715
—— *v.* Marling	1 Webs. Pat. Cas. 493	829
Light v. Light	25 Beav. 248	125
Lindon *v.* Sharp	6 Man. & G. 895	262
Linsley, Ex parte	Law Rep. 9 Ch. 290	324
London (Bishop of), Ex parte	1 D. F. & J. 14	360
London and County Banking Company, Ex parte	Law Rep. 16 Eq. 391	750
London and County Coal Company, In re	Law Rep. 3 Eq. 355	774
London and North Western Railway Company *v.* Ackroyd	31 L. J. (Ch.) 589	242
London, Birmingham, and South Staffordshire Banking Company, In re	34 Beav. 332	102
London Marine Insurance Association, In re	Law Rep. 8 Eq. 176, 195	776
Longworth's Executors, Ex parte	Joh. 465; 1 D. F. & J. 17	771, 774
Lovering, Ex parte	Law Rep. 9 Ch. 586	804
Luxford *v.* Cheeke	3 Lev. 125	179, 496
Lynch, Ex parte	2 Ch. D. 227	322, 775
Lyne's Estate, In re	Law Rep. 8 Eq. 482	630
Lyons, Ex parte	Law Rep. 7 Ch. 494	432

M.

Macartney *v.* Barrow	7 East, 437, n.	102
McCarogher *v.* Whieldon	Law Rep. 5 Eq. 236	402
McCorquodale *v.* Bell	24 W. R. 399	655
McEuen *v.* West London Wharves and Warehouses Company	Law Rep. 6 Ch. 655	673
Machin *v.* Salkeld	2 Dick. 634	125
Mackay, Ex parte	Law Rep. 8 Ch. 643	259, 294
MacKenzie, Ex parte	Law Rep. 10 Ch. 88	330
Maddison *v.* Chapman	4 K. & J. 709	179
Marine Mansions Company, In re	Law Rep. 4 Eq. 601	338
Marsden, Ex parte	2 Ch. D. 786	799
Martin *v.* Laverton	Law Rep. 9 Eq. 563	503
—— *v.* Mitchell	2 Jac. & W. 413	466
—— *v.* Powning	Law Rep. 4 Ch. 356	550

		PAGE
Maryport Railway Act, In re	32 Beav. 397	361
Mascarenas, Ex parte	1 Dea. & Ch. 507	809
Mason *v.* Broadbent	33 Beav. 296	714
Matthaei *v.* Galitzin	Law Rep. 18 Eq. 340	385
Matthison *v.* Clarke	3 Drew. 3	156
Maxwell *v.* Hogg	Law Rep. 2 Ch. 307	419
——— *v.* Wightwick	Law Rep. 3 Eq. 210	211
Mayn *v.* Mayn	Law Rep. 5 Eq. 150	47
Melhado *v.* Porto Alegre Railway Company	Law Rep. 9 C. P. 503	776
Mercer *v.* Hall	4 Bro. C. C. 326	757
——— *v.* Paterson	Law Rep. 2 Ex. 304; Ibid. 3 Ex. 104	260
Merry *v.* Nickalls	Law Rep. 8 Ch. 205	493
Meymot, Ex parte	1 Atk. 196	771
Meynell *v.* Surtees	1 Jur. (N.S.) 737	466
Micholls *v.* Corbett	3 D. J. & S. 18	514
Midland Railway Company *v.* Checkley	Law Rep. 4 Eq. 19	237
Mildmay *v.* Quicke	Law Rep. 20 Eq. 537	687
Millington *v.* Fox	3 My. & Cr. 338	454
Mills *v.* Brown	21 Beav. 1	630
Milnes, In re	1 Ch. D. 28	690
Milsom *v.* Awdry	5 Ves. 465	352
Mittam, Re	4 Jur. (N.S.) 1077	47
Mogg *v.* Mogg	1 Mer. 654	419
Moore, In re	Law Rep. 19 Eq. 256	174
Morgan *v.* Dutton	9 Mod. 135	30
——— *v.* Higgins	1 Giff. 270	157
——— *v.* Morgan	Law Rep. 10 Eq. 99	620
——— *v.* Seaward	2 M. & W. 544	828
Morrison *v.* Barrow	1 D. F. & J. 633	82
Motion, In re	Law Rep. 9 Ch. 192	53
Mott *v.* Shoolbred	Law Rep. 20 Eq. 22	698
Muirhead, Ex parte	2 Ch. D. 22	424
Muntz *v.* Foster	2 Webs. Pat. Cas. 92	829
Murray *v.* Clayton	Law Rep. 10 Ch. 570	829
Musgrove, Ex parte	3 M. D. & D. 387	808
Muskett *v.* Eaton	1 Ch. D. 435	419
Myerscough, Ex parte	1 Jac. & W. 152	41

N.

National Financial Company, In re	Law Rep. 3 Ch. 791	599
Neath and Brecon Railway Company, In re	Law Rep. 9 Ch. 263	205
Neilson *v.* Harford	1 Webs. Pat. Cas. 331	829
Nelson *v.* Duncan	9 Beav. 211	125
New Clydach Sheet and Bar Iron Company, In re	Law Rep. 6 Eq. 514	639
Newman's Settled Estates, In re	Law Rep. 9 Ch. 681	526
Nicholson *v.* Tutin	3 K. & J. 159	154
Nickalls *v.* Merry	Law Rep. 7 H. L. 530	630
Nicol *v.* Vaughan	2 Dowl. & C. 420; 1 My. & K. 253	96
Northumberland and Durham District Banking Company, Re	2 De G. & J. 357	612
Norton, Ex parte	Law Rep. 16 Eq. 397	77
Nunn *v.* Barlow	1 S. & S. 588	421

O.

		PAGE
Oakes *v.* Turquand	Law Rep. 2 H. L. 325	613
Ockenden, Ex parte	1 Atk. 235	490
Old, Ex parte	Law Rep. 17 Eq. 457	59

P.

Palmer *v.* Scott	1 Russ. & My. 391	471
Panama, New Zealand, and Australian Royal Mail Company, In re	Law Rep. 5 Ch. 318	338
Paper Staining Company, Ex parte	Law Rep. 8 Ch. 595	66
Patterson *v.* Patterson	Law Rep. 2 P. & M. 189	24
Payne *v.* Dicker	Law Rep. 6 Ch. 578	809
Pearsall *v.* Simpson	15 Ves. 29	179
Pearson *v.* Rutter	3 D. M. & G. 398	175
Pedder's Settlement Trusts, In re	Law Rep. 10 Eq. 585	364, 708
Peel's Case	Law Rep. 2 Ch. 674	613
Penny *v.* Allen	7 D. M. & G. 409	620
Perceval *v.* Perceval	Law Rep. 9 Eq. 386	418
Perry *v.* Oriental Hotels Company	Law Rep. 5 Ch. 420	183, 728
——— *v.* Truefitt	6 Beav. 66	450
Phillips *v.* Furber	Law Rep. 5 Ch. 746	551
Pickering *v.* Cape Town Railway Company	Law Rep. 1 Eq. 84	113
Pilborow *v.* Pilborow	5 C. B. 440	616
Pile *v.* Salter	5 Sim. 411	496
Pleasant *v.* Benson	14 East, 234	237
Ponsford *v.* Hartley	2 J. & H. 736	110
Pooley *v.* Quilter	2 De G. & J. 327	194
Potter *v.* Sanders	6 Hare, 1	466
Powlett *v.* Powlett	1 Vern. 204	179
Price *v.* Hall	Law Rep. 5 Eq. 399	419
Priestley *v.* Holgate	3 K. & J. 286	757
Prince *v.* Cooper	16 Beav. 546	411
Pritchard *v.* Pritchard	Law Rep. 2 P. & M. 58	24
Purdey's Case	16 W. R. 660	673
Purser *v.* Darby	4 K. & J. 41	502

R.

Ralston *v.* Smith	11 C. B. (N.S.) 471; 11 H. L. C. 223	829
Randall *v.* Willis	5 Ves. 262	46
Reader, Ex parte	Law Rep. 20 Eq. 763	132
Rede *v.* Oakes	4 D. J. & S. 505	543
Reed *v.* Braithwaite	Law Rep. 11 Eq. 514	179
Reeve *v.* Whitmore	4 D. J. & S. 1	294
Reid *v.* Langlois	1 Mac. & G. 627	646
Reuss (Princess of) *v.* Bos	Law Rep. 5 H. L. 176	615
——— *v.* Picksley	Law Rep. 1 Ex. 342	465
Reynard *v.* Spence	4 Beav. 103	393
Rhodes *v.* Whitehead	2 Dr. & Sm. 532	418
Richards *v.* Bayly	1 J. & Lat. 120	153
——— *v.* Cooper	5 Beav. 304	211
Riche *v.* Ashbury Railway Carriage Company	Law Rep. 9 Ex. 224	776
Riches *v.* Owen	Law Rep. 3 Ch. 820	551
Ridgway *v.* Wharton	3 D. M. & G. 677	299

		PAGE
Riley *v.* Garnett	2 De G. & Sm. 629	419
Roberts *v.* Hughes	Law Rep. 6 Eq. 20	211
Robinson, Ex parte	Mont. & Mac. 44	809
Robinson's Will, In re	9 Jur. (N.S.) 885	484
Roe *v.* Reade	8 T. R. 118	512
Rolfe *v.* Chester	20 Beav. 610	716
—— *v.* Flower & Co.	Law Rep. 1 P. C. 27	775
Rose *v.* Hart	8 Taunt. 499	490
—— *v.* Watson	10 H. L. C. 672	503
Ross *v.* Gibbs	Law Rep. 8 Eq. 522	646, 652
Routledge *v.* Grant	4 Bing. 653	466
Ruffle, Ex parte	Law Rep. 8 Ch. 997	65
Rustomgee *v.* Reg.	24 W. R. 428	382

S.

St. John's Hospital, In re	3 Mac. & G. 235	560
Sanderson's Patents Association, In re	Law Rep. 12 Eq. 188	774
Sandon *v.* Hooper	6 Beav. 246	164
Savage *v.* Tyers	Law Rep. 7 Ch. 356	415
Savill *v.* Barchard	4 Rep. 53	490
Say *v.* Smith	Plowd. 269; 5 Vin. Abr. 87, par. 6	314
Scawen *v.* Blunt	7 Ves. 294	216
Scholey *v.* Central Railway Company of Venezuela	Law Rep. 9 Eq. 266, n.	673
Scott *v.* Salmond	1 My. & K. 363	633
Sells *v.* Sells	1 Dr. & Sm. 42	46
Sharp *v.* Taylor	2 Ph. 801	771
Shaw *v.* Foster	Law Rep. 5 H. L. 321	503
—— *v.* Johnson	1 Dr. & Sm. 412	716
Shephard *v.* Beane	2 Ch. D. 223.	724
Shepherd *v.* Harrison	Law Rep. 5 H. L. 116.	281
Sheppard *v.* Oxenford	1 K. & J. 491	777
Sherwood *v.* Sanderson	19 Ves. 280	125
Shore *v.* Wilson	9 Cl. & F. 355	560
Shrimpton *v.* Laight	18 Beav. 164	450
Sidney *v.* Vaughan	3 Bro. P. C. (Toml. Ed.) 254	180
Simpson *v.* Holliday	Law Rep. 1 H. L. 315	97
Singer Company *v.* Kimball	11 Court of Sess. Cases (3rd Series) 267	449
Skinner *v.* Great Northern Railway Company	Law Rep. 9 Ex. 298	646
Skinner *v.* McDouall	2 De G. & Sm. 265	299
Slater *v.* Jones	Law Rep. 8 Ex. 186	486
Slipper *v.* Tottenham and Hampstead Junction Railway	Law Rep. 4 Eq. 112	242
Smith, Knight, & Co., In re	Law Rep. 8 Eq. 23	577
Sopwith *v.* Maughan	30 Beav. 235	393
Speer *v.* Crawter	2 Mer. 410	592
Spencer *v.* Topham	22 Beav. 573	195
Spencer's Case	1 Sm. L. C. 7th Ed. p. 72	314
Spirett *v.* Willows	Law Rep. 4 Ch. 407	47
Stallard, Ex parte	Law Rep. 3 Ch. 408	789
Steele *v.* Stewart	1 Ph. 471	646
Stephens, Ex parte	Law Rep. 20 Eq. 786	260
Stevens, Ex parte	2 Ph. 772	205
——— *v.* Van Voorst	17 Beav. 305	708

		PAGE
Stokoe *v.* Cowan	29 Beav. 637	272
Stone *v.* Thomas	Law Rep. 5 Ch. 219	551
Streatfield *v.* Streatfield	1 Wh. & T. L. C. 3rd Ed. p. 302	393
Sturt & Co., Ex parte	Law Rep. 13 Eq. 309	102
Styan, Ex parte	Joh. 387	419
Swift *v.* Wenman	Law Rep. 10 Eq. 15	319
Sykes *v.* Sheard	33 L. J. (Ch.) 181	757
—— *v.* Sykes	3 B. & C. 541	454

T.

Taggart *v.* Taggart	1 Sch. & Lef. 84	46
Talbot *v.* Kemshead	4 K. & J. 93	211
Tapling *v.* Jones	11 H. L. C. 290	167
Tasker *v.* Small	3 My. & Cr. 63	725
Taylor, Ex parte	3 De G. & J. 480	808
—— *v.* Dowlen	Law Rep. 4 Ch. 697	69
—— *v.* Ifill	1 N. R. 566	775
—— *v.* Wakefield	6 E. & B. 765	471
Tempest, Ex parte	Law Rep. 6 Ch. 70	132
Teynham *v.* Lennard	4 Bro. P. C. 302 (Toml. Ed.)	41
Thames Plate Glass Company *v.* Land and Sea Telegraph Construction Company	Law Rep. 6 Ch. 643; Ibid. 11 Eq. 248.	183
Tharp's Estate, In re	1 D. J. & S. 453	352
Thexton *v.* Edmondston	Law Rep. 5 Eq. 373	138
Thirtle *v.* Vaughan	2 W. R. 632; 24 L. T. (O.S.) 5	503
Thomas *v.* Reg.	Law Rep. 10 Q. B. 44	383
—— *v.* Thomas	2 K. & J. 79	620
—— *v.* ——	32 Beav. 341	717
—— *v.* Tyler	3 Y. & C. Ex. 255	384
Thompson *v.* Partridge	4 D. M. & G. 794	138
Thomson *v.* Thomson	7 Ves. 470	776
Thornbury *v.* Bevill	1 Y. & C. Ch. 554	471
Thorpe, In re	Law Rep. 8 Ch. 743	432
Thynne *v.* Glengall (Earl of)	2 H. L. C. 131	402
Tilleard, In re	3 D. J. & S. 519	624
Tooke *v.* Hollingworth	3 T. R. 215	286
Topham, Ex parte	Law Rep. 8 Ch. 614	133, 260
Towns *v.* Wentworth	11 Moo. P. C. 526	416
Townsend, In re	1 Mac. & G. 686	71
Treleven *v.* Bray	1 Ch. D. 176	52, 724
—— *v.* ——	45 L. J. (Ch.) 113; 1 Ch. D. 176	740
Trimingham *v.* Maud	Law Rep. 7 Eq. 201	281
Troughton *v.* Gitley	Amb. 629	426
Tucker *v.* Hernaman	4 D. M. & G. 395	426
Tulloch *v.* Tulloch	Law Rep. 3 Eq. 574	411
Turquand *v.* Wilson	1 Ch. D. 85	687
Twyne's Case	2 Rep. 80 b.	106

V.

Vale *v.* Oppert	Law Rep. 10 Ch. 340	144
Valpy and Chaplin, Ex parte	Law Rep. 7 Ch. 289	340, 346
Varley *v.* Coppard	Law Rep. 7 C. P. 505.	313
Venables *v.* Schweitzer	Law Rep. 16 Eq. 76	577
Viant's Settlement Trusts, In re	Law Rep. 18 Eq. 436.	364
Vizard's Trusts, In re	Law Rep. 1 Ch. 589	809

W.

		PAGE
Waite *v.* Littlewood	Law Rep. 8 Ch. 70	351
Wall *v.* Bright	1 Jac. & W. 494	502
—— *v.* Tomlinson	16 Ves. 413	216
Walton, Ex parte	Law Rep. 10 Ch. 15	232
Wake *v.* Conyers	1 Eden, 331	592
—— *v.* Wake	3 Bro. C. C. 255; 1 Ves. 335	393
Waring, Ex parte	19 Ves. 345	282
Warner *v.* Willington	3 Drew. 523	465
Waterer, Ex parte	22 W. R. 426	65
Watts *v.* Hyde	2 Coll. 368; 2 Ph. 406	733
Weall *v.* Rice	2 Russ. & My. 251	402
Wells *v.* Malbon	31 Beav. 48	319
West *v.* Baker	1 Ex. D. 44	427
West Surrey Tanning Company, In re	Law Rep. 2 Eq. 737	774
Western Bank of Scotland *v.* Addie	Law Rep. 1 H. L., Sc. 145	671
Western of Canada Oil, Lands, and Works Company, In re	Law Rep. 17 Eq. 1	118
Weston *v.* Collins	13 W. R. 510	313
Wheeler, In the Goods of	31 L. J. (Pro.) 40	216
Wheeler & Wilson Company *v.* Shakspear	39 L. J. (Ch.) 36	448
White *v.* Jameson	Law Rep. 18 Eq. 303	696
—— *v.* Simmons	Law Rep. 6 Ch. 555	550
Whitfield, Ex parte	2 Atk. 316	41
Whitmore *v.* Mason	2 J. & H. 204	340
Whittaker *v.* Whittaker	4 Bro. C. C. 31	521
Wickens *v.* Townsend	1 Russ. & My. 361	294
Wildman *v.* Wildman	9 Ves. 174	216
Wild's Case	6 Rep. 16 b.	497
Wilkinson *v.* Gibson	Law Rep. 4 Eq. 162	319
—— *v.* Nelson	9 W. R. 393	46
—— *v.* Parry	4 Russ. 272	175
Williamson, Ex parte	Law Rep. 5 Ch. 309	777
Williams *v.* Chambers	10 Q. B. 337	809
—— *v.* Harding	Law Rep. 1 H. L. 9	11, 23
Wilson *v.* Smith	2 Ch. D. 67	811
—— *v.* Thornbury	Law Rep. 10 Ch. 239	393
Winder, Ex parte	1 Ch. D. 290	798
Wing *v.* Angrave	8 H. L. C. 183	215
Winterton *v.* Crawford	1 Russ. & My. 407	351
Wooldridge *v.* Norris	Law Rep. 6 Eq. 410	110
Woolley *v.* North London Railway Company	Law Rep. 4 C. P. 602	646
Woolscomb, Re	1 Madd. 213	41
Worthington *v.* Evans	1 S. & S. 165	757
Wotherspoon *v.* Currie	Law Rep. 5 H. L. 508	448
Wright *v.* Hale	6 H. & N. 227	591
Wright *v.* Simpson	6 Ves. 714	741
Wynn Hall Coal Company, In re	Law Rep. 10 Eq. 515	340, 346

Y.

Yates *v.* Jack	Law Rep. 1 Ch. 295	167
Young *v.* Fernie	4 Giff. 577	829
—— *v.* Macintosh	13 Sim. 445	46

CASES

DETERMINED BY THE

CHANCERY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

CHIEF JUDGE IN BANKRUPTCY

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE CHANCERY DIVISION AND THE CHIEF JUDGE

AND IN

LUNACY.

In re MORVAH CONSOLS TIN MINING COMPANY.

C. A.
1875
Nov. 9.

McKAY'S CASE.

Companies Act, 1862, s. 165—*Misfeasance—Officer of Company—Benefit to Agent—Amount of Damages—Contributories.*

The owner of a mine, by an agreement adopted by a company, agreed with *M.*, acting on behalf of the company, to sell the mine to the company for a price partly in cash and partly in paid-up shares. By another agreement not known to the company, the vendor was to give to *M.* for his trouble 600 of the paid-up shares. The company was formed, and whilst *M.* was secretary to the company the shares were allotted to the vendor, and transfers of 600 of them by the vendor to *M.* were prepared. The 600 shares were afterwards transferred to *M.*, and 500 of them remained in his name when the company was ordered to be wound up :—

Held, that *M.* had been guilty of misfeasance in relation to the company,

C. A.
1875
McKAY'S CASE.

and could, under sect. 165 of the *Companies Act*, 1862, be made to contribute in respect of such misfeasance:

Held, that the measure of the damages to be contributed by *M.* was the highest value of the shares transferred to him, and that as some of the shares had been allotted to solvent shareholders, the value must be taken to be the amount unpaid on the shares.

Quære, whether *M.* could be made a contributory in respect of these shares, as shares on which nothing had been paid.

Statement.

JAMES HAMMON was lessee, or part lessee, of a mine in *Cornwall*, called the *Morvah Mine*, and wishing to sell this mine, he entered into negotiations with one *Fisher*, who requested *G. S. McKay* to attend to the business.

Several arrangements appeared to have been made between *Hammon* and one *Evans*, who had an interest in the mine, and *Fisher* and *McKay;* but the ultimate arrangement was shewn to be that *McKay* should get up a company to buy the mine for £6000, and should receive from *Hammon* £3000 in 600 £5 paid-up shares. A formal agreement, dated the 2nd of November, 1871, was then executed between *Hammon* and *McKay*, on behalf of the intended company, for the purchase by *McKay* from *Hammon* of the mine for £6000, one half in cash, one half in shares. The company, under the name of the *Morvah Consols Tin Mining Company*, was registered on the 7th of November, with a capital of £15,000 in 3000 shares of £5 each, and the agreement for purchase was adopted in the articles of association. *McKay* signed the memorandum of association for twenty shares. He was appointed secretary of the company, and remained so until the 2nd of March. The company was duly advertised, but only thirty-five shares were applied for by the public: 600 shares were, however, taken by Colonel *Holland*, a friend of *Fisher's*. The agreement between *Hammon* and the company was afterwards modified, so that *Hammon* was to receive £1000 only in cash and 1000 £5 shares. On the 2nd of March, at a meeting of the directors, at which *McKay* was present as secretary, 1000 shares were allotted to *Hammon*, and, on the 12th of April, at the request of *Fisher*, as *McKay* alleged, *Hammon* transferred to *McKay* the 600 shares. *McKay* had then left *England*, and ceased to act as secretary, but he had previously signed the transfer to himself; and he signed and left with *Fisher* a blank transfer enabling *Fisher*

to deal with the shares. One hundred of the shares had been transferred by *Fisher* to Colonel *Holland*, but the remaining 500 shares remained in *McKay's* name. He returned to *England*, and in 1874 he became a director of the company. In 1875 the company was ordered to be wound up in the Stannary Court, and the liquidator applied for an order on *McKay* to pay £2500 in respect of the 500 shares, as having been guilty of misfeasance within the 165th section of the *Companies Act*, 1862.

The Vice-Warden of the Stannaries made an order accordingly (1).

(1) H. W. Fisher, Vice-Warden of the Stannaries, said that the first question to be determined in this case was whether *McKay* was an agent of the company in the making of the contract with the vendor for the purchase of its property; and as he first arranged the contract which was to bind the company, and then, having assisted in binding the company by it, he must be held to have been an agent of the company to make the contract. And it was not disputed that there was a stipulation between *Hammon* and *McKay* for *McKay's* benefit. The Vice-Warden then proceeded:—

There is no evidence that the arrangement between *McKay* and the vendor was ever communicated to the shareholders. It is true that in the memorandum of association it is stated that fully paid-up shares were to be issued to the vendor or his nominee, but it appears to me that, considering the fiduciary relation in which *McKay* stood to the company in this matter, the shareholders would be entitled to assume that whilst contracting in their interest he was not at the same time contracting with the vendor to be himself one of these nominees, and that a sum of £640 14*s.* 5*d.* appearing in the first balance-sheet submitted to them for "preliminary expenses" covered all those which had been incurred in the formation of the company over and above the purchase-money paid to the vendor.

That the stipulation was not only for the benefit, at least for the then presumed benefit of *McKay*, but prejudicial to the company, can, I think, admit of no doubt. The effect of it was to increase the price paid for the mine for the benefit of the purchaser's agent by shares representing £3000 of capital, and, as it happens in this case, capital which might, not improbably, have been realized.

I cannot, therefore, escape from the conclusion that Mr. *McKay* is liable upon these shares. I will, however, notice briefly the points relied upon by him. First, it is said that he had earned this remuneration, but surely it was for the company, his principals, to judge of this and fix the amount. Then it was submitted that the shares have proved worthless, and that everything has collapsed. This makes the case appear hard. But it must be remembered that because the shares proved worthless to *McKay*, it does not therefore follow that they would have been worthless to the company, to whom they rightfully belonged. This consideration, however, is really immaterial to the issue. The ground upon which *McKay* must be declared liable to pay upon these shares is, that inasmuch as he is

C. A. 1875 McKay's Case.

McKay appealed.

There was evidence that the shares had never been of any value, and that some of the persons to whom they were issued were insolvent and had not paid the calls, but on some of the shares allotted the calls had been paid.

Argument.

Ince, Q.C., and *Langworthy*, for the Appellant, contended that throughout the business he was only acting for *Fisher*, and that *Fisher*, at all events, was no officer of the company. At all events *McKay*, as a trustee for the company, could, under sect. 165, be charged only with what he had actually received, and he had never received a shilling. Nor could he have ever got anything, as the shares never had any value.

The utmost relief is that he may be declared trustee for the

---

not entitled to hold them as fully paid up, he cannot avoid the liability which attaches to them as shares upon which nothing has been paid.

McKay also sets up the memorandum of agreement. But, as I think sufficiently appears already, the gist of the case against him is that which is expressed in the agreement, because the paid-up shares there contracted to be given to the vendor for his property were in truth, by arrangement between the vendor and *McKay*, intercepted by *McKay*, so that the company got no consideration for them.

One word as to the procedure. It was, I think, upon these facts, open to the official liquidator to have settled *McKay* as a contributory in respect of those 500 shares. He has, however, preferred to proceed under the 165th section of the *Companies Act*, 1862, alleging that *McKay* was an officer of the company, and had been guilty of misfeasance or breach of trust. Now, *McKay* was secretary to the company when it was first formed, and held that office when he executed the transfer of the shares from *Hammon* to himself, and he was a director when the company was ordered to be wound up. He is, therefore, an officer of the company amenable to the 165th section. It follows, from what has been said, that he has been guilty of misfeasance or breach of trust towards the company, not, as it appears to me, in the discharge of the duties of either office, but as an agent acting on behalf of the company in a special matter; and this, I think, is sufficient to satisfy the requirements of the section, which does not limit the wrongful acts complained of to those done by the officer acting as such.

Whether, however, the official liquidator had proceeded against *McKay* as a contributory to be called upon, or under the 165th section, the practical result would be the same. All the capital of the company has been called up, and the amount which *McKay* is liable to contribute to the assets of the company under the 165th section is the same as he must have been called upon to pay as a contributory holding unpaid shares.

The order must be made absolute for the payment of £2500, with costs, on or before the 14th of October next.

company of the shares, if, indeed, he was a trustee for the company. At all events, he ought only to pay the value of the shares, and they are worthless.

Marten, Q.C., and *Northmore Lawrence*, for the official liquidator, were not called upon.

MELLISH, L.J.:— Judgment, Mellish, L.J.

It appears to me that the decision of the Vice-Warden is perfectly correct. The principle to be applied to the case is plain enough. *McKay* was the secretary of the company, and was also the person employed on their behalf (he was, perhaps, also agent for *Fisher*, but that appears to be wholly immaterial) to enter into negotiations with *Hammon* for the sale of mining property to the company. An agreement for the sale of the property to the company was entered into between *Hammon*, of the one part, and *McKay*, on behalf of the company, of the other part, for the sale of the property for £6000, £3000 in cash and £3000 in shares, which was afterwards altered to £1000 in cash and £5000 in shares. There was also an agreement—whether contemporaneously with or after the agreement for the sale of the property to the company is immaterial—that *McKay* or *Fisher* should receive from *Hammon* 600 fully paid-up shares, but unquestionably there was never any consideration for the transfer of those 600 shares from *Hammon* to *McKay* beyond the benefit which *Hammon* had derived from *McKay* or *Fisher* while they were acting in the transaction as agents of the company. Either as a matter of bargain or as a present to the agent of the purchaser, it was in consideration of a benefit which the vendor had received from the company's agents. Now it is quite clear that, according to the principles of a Court of Equity, all the benefit which the agent of the purchaser receives under such circumstances from the vendor must be treated as received for the benefit of the purchaser. It was so laid down in *Hay's Case* (1), and in many other cases. All the remuneration which an agent so receives he receives on behalf of his principal, and it does not matter whether it formed part of the original bargain or was a present as remuneration for services. That

(1) Law Rep. 10 Ch. 593.

C. A. 1875 — McKay's Case. — Judgment, Mellish, L.J.

being so, it is clear that all the shares transferred by *Hammon* to *McKay*, for which there was no other consideration than the benefit which *Hammon* derived from *McKay* in the course of his agency, belong to the company. The company are entitled to say to *McKay*, "Either these shares ought never to have had any existence, or else you hold them only as a trustee for the company." That is the substance of the transaction, and in the view of this Court *McKay* is liable for the value of the 500 shares.

Then the question arises, whether the value of the shares can be recovered by this proceeding under the 165th section of the *Companies Act*, 1862. I agree that to bring the case within that section it is necessary that the person summoned should have been an officer of the company at the time when the wrongful act complained of was committed. In the present case *McKay* was an officer of the company when the act was committed, or at any rate at the time when it was begun to be committed. He being secretary of the company, and knowing all the facts, allowed the directors of the company to allot these shares to *Hammon* without mentioning the circumstance that in truth the shares belonged to the company. It is immaterial that the actual transfer of the shares to himself did not in fact take place till after he had ceased to be secretary to the company. It does, however, appear that before he gave up his office and went to *America* he signed the transfer in blank. I am, therefore, of opinion that this proceeding was rightly taken under the 165th section of the Act, and that it was not necessary to file a bill.

Then comes the question, what is the proper amount of damages to be paid? I do not quite agree with the Vice-Warden, that because *McKay* is not entitled to have the shares as fully paid-up shares, therefore he is to be treated as a holder of unpaid shares. I think he is only liable for what was the fair value of the shares when the allotment was made, or at any subsequent time. But *McKay* is a wrongdoer, and therefore, in estimating the damages, a presumption may be made against him which could not be made against a person who was not a wrongdoer. A considerable number of shares were taken by solvent persons, though no doubt a great many were allotted to persons who proved insolvent. But it was the duty of the directors to see that the shares were taken

by solvent persons, and it is impossible, in favour of a wrongdoer, to assume that the persons who might otherwise have taken these shares would have been insolvent. It must be assumed that these shares could have been disposed of for their full amount. Those of the shareholders who are solvent have been compelled to pay up the full nominal amount of their shares, and therefore I think that the amount of damages has been properly fixed, and that the Vice-Warden's order is quite right. The appeal must therefore be dismissed with costs.

Judgment, Mellish, L.J.

BRETT, J.:—

Brett, J.

I am not quite sure that I agree with all the reasons given by the Vice-Warden in his judgment; but still I think that the result is one in which the Court ought to concur, inasmuch as *McKay*, whilst an officer of the company, has been guilty of a misfeasance. At a time when he was not an officer of the company he entered into an agreement for the purchase of a mining property from *Hammon*. By this agreement it was made to appear that the company was to pay for the mine a sum of money made up partly of cash and partly of fully paid-up shares in the company. But there was a concealed agreement between *McKay* and the vendor, that 600 of these fully paid-up shares were not really to be paid to *Hammon*, but to *Fisher* or *McKay*, as remuneration for their trouble in the transaction. In truth, therefore, the company was made to believe that they were paying to *Hammon*, and that he was receiving from them, a particular sum as the purchase-money for his property, though in truth *Hammon* was only to receive a part of that purchase-money, and the company were made to pay these shares to *Fisher* or *McKay* for, in fact, deceiving the company. It appears to me that, without entering into the question of legal or equitable fraud, there is not much difficulty in saying that this was a fraud on the part of *McKay* and *Fisher*, and at any rate it was a misfeasance. This was done at a time when *McKay* was not an officer of the company; but then he committed another misfeasance after he became secretary to the company, partly by concealment and partly by assisting *Hammon* to make the transfer, and so to carry out the wrongful agreement into which he had previously entered. This was a wrongful act done

C. A. 1875 — McKay's Case.

by him, not as trustee, but while he was an officer of the company, and this Court has jurisdiction under the 165th section of the *Companies Act*, 1862, to order him to contribute.

Judgment, Brett, J.

The Court had therefore jurisdiction to make him, under that section, pay compensation to the company for his misfeasance. There is no fixed legal rule to determine the amount of the damages. Of course he cannot be ordered to pay any damages which are not consequent on the act, but he can be ordered to pay the largest amount of damages which could at any time have been incurred. This may be said to be the full value of the shares, as it may be assumed that they might have been allotted to a solvent holder, who would have paid for these shares if *McKay* had not had them. If a solvent holder could not have been found the case might be different, but where a clerk in an office chooses to allow himself to be made a tool of in order to carry out such a transaction as this, the Court ought to compel him to pay the largest possible amount of damages.

I am, therefore, of opinion that the Vice-Warden was right in ordering *McKay* to contribute to the assets of the company the full nominal value of the shares, that being the largest amount of damages which could have resulted from his misfeasance.

James, L.J.

JAMES, L.J. :—

I entirely agree with the judgments of both my learned Brothers. I only desire to add that, while we do not at present express our concurrence in the judgment of the Vice-Warden that *McKay* is to be treated as a holder of unpaid shares, we do not intend to express our dissent from that view. It may be a question of importance in other cases in which the holder of shares transferred in this way is not an officer of the company.

Solicitors for Appellant: *Haywards, Keele, & Swann.*
Solicitors for Official Liquidator: *Gregory & Co.*

Ex parte RASHLEIGH. *In re* DALZELL.

C. A. 1875 Nov. 16; Dec. 15.

Bankruptcy—Passing of Act—Act taking Effect—Partners—Debt—Non-trader Debtor's Summons—Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *ss.* 90, 232 —*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 118.

A partner not a trader was indebted to the partnership and also to some of the partners separately. By deeds executed by the debtor after the *Bankruptcy Act*, 1861, had received the Royal Assent, but supposed to have been executed before it came into operation, he covenanted to pay to trustees for the other partners a sum fixed upon as principal, and to pay interest thereon, and he gave a mortgage as security. A debtor's summons was issued for the money covenanted to be paid:—

Held, that the debt was not contracted within the meaning of the 118th section of the *Bankruptcy Act*, 1869, until the execution of the deed of covenant:

Held, that the time defined by the words "passing of the *Bankruptcy Act*, 1861," in the same section is the time when the Act of 1861 received the Royal Assent, and not the time when it came into operation; and that, therefore, the non-trader might be adjudicated bankrupt on a debtor's summons issued for payment of the debt so contracted.

Order of *Bacon*, C.J., discharged.

Statement.

FOR some time before the month of September, 1861, *Robert Dalzell* and *John Dalzell* had been partners with *J. E. Buller*, *H. R. Rashleigh*, and four others in a colliery.

By a deed dated the 10th of September, 1861, and made between *Robert Dalzell* of the first part, *John Dalzell* of the second part, and the other partners in the colliery, except *J. E. Buller*, of the other six parts; after reciting certain deeds and articles of partnership, and that *Buller* was liable to pay to the partnership £4750, and other sums, and had become bankrupt; and reciting certain arrangements with *Buller's* assignees, and many other matters and dealings between the partners; and reciting that certain sums of money were due from *Robert Dalzell* and *John Dalzell* for partnership calls unpaid and interest thereon, and that £2000 had been advanced for them; and that it had been agreed between the parties that *R. Dalzell* and *J. Dalzell* should not pay to the partnership the principal sums so due from them in respect of calls, or the interest thereon up to that day, but should

C. A. 1875

Ex parte RASHLEIGH. *In re* DALZELL.

Statement.

in respect thereof pay to the other partners the principal sum of £4285 5*s.* 4*d.* (which appeared to be considerably less than the amount of calls unpaid and interest thereon); and that it had been agreed that the other partners should advance the sum of £2000 and £76 13*s.* 2*d.* for interest, to pay off the sum of £2000 and interest thereon due by *R. Dalzell* and *J. Dalzell* to some of the partners, It was witnessed that the parties, and particularly *R. Dalzell* and *J. Dalzell*, covenanted each with the other that certain things should be done constituting, in fact, a new partnership; and that repayment by *R. Dalzell* and *J. Dalzell* of the several sums of £4285 5*s.* 4*d.*, £76 13*s.* 2*d.*, £800, and £1200, making together the sum of £6361 18*s.* 6*d.*, and any other sums which might be advanced by the other partners to *R. Dalzell* and *J. Dalzell*, or either of them, with interest, should be secured by an indenture of mortgage of the same date, as therein mentioned. The indenture of mortgage of the same date was made between *R. Dalzell* of the first part, *J. Dalzell* of the second part, and Sir *W. B. Call* and *J. King*, two of the other partners in the colliery, of the third part; and thereby *J. Dalzell* and *R. Dalzell* conveyed to Sir *W. B. Call* and *J. King* certain manors and lands by way of mortgage for securing the payment of the £6361 18*s.* 6*d.* and interest, and further advances, and covenanted for payment of the £6361 18*s.* 6*d.*, and interest, and further advances.

J. King and Sir *W. B. Call* were both dead, and *Rashleigh*, the executor of the survivor, brought against *R. Dalzell* an action on the covenant to recover £9256 11*s.* 11*d.* for the original sum, certain further advances, and interest. Judgment was, on the 3rd of September, 1874, signed in this action, and soon afterwards *Rashleigh* obtained a debtor's summons against *R. Dalzell* for £9433, the then amount of debt, interest, and costs.

The County Court Judge dismissed the summons, on the ground that at the time when the debt was contracted *R. Dalzell* was not a trader, and was not liable to be adjudged bankrupt on a debtor's summons. The Chief Judge in Bankruptcy affirmed the decision, holding that the debt was contracted at the date of the deed, the 10th of September, 1861; that though the Act of 1861 received the Royal Assent on the 6th of August, 1861, yet as it did not come into operation until the 11th of October, 1861, which was

after the time when the debt was contracted (1), *R. Dalzell*, not being a trader, could not on a debtor's summons for that debt be adjudged bankrupt (2); as reported (3).

Rashleigh appealed.

Statement.

On the appeal coming on to be heard, it was suggested that though the deed bore the date of the 10th of September, 1861, it might not have been executed until after the 11th of October, 1861, when the *Bankruptcy Act* came into operation. An inquiry was accordingly directed, and evidence was taken, the result of which was, in the opinion of their Lordships, that the deed was not executed by *R. Dalzell* until some time in November, 1861.

Argument.

De Gex, Q.C., and *F. Knight*, in support of the appeal:—

We say that the debt on which the summons was issued did not exist until the execution of the deed, which was after the Act of 1861 came into operation; and therefore the debtor, being a non-trader, is within the Act of 1869. It is impossible to go behind this deed and say that the debt existed previously. No doubt there were accounts between the partners, but until the deed was executed there was no debt on which *Dalzell* could have been sued. But even assuming that the debt was constituted on the 10th of September, 1861, we say that that being after the passing of the Act, the debtor comes under sect. 118 of the Act of 1869.

Karslake, Q.C., and *Herbert Smith*, for *Dalzell*:—

This debt was contracted long before, and the deed merely provides security for the payment. *Williams* v. *Harding* (4) is a clear authority on the point. Calls were made just as in that case, though

(1) 24 & 25 Vict. c. 134, s. 90: "The debt of the petitioning creditor of any debtor not being a trader .... must be a debt contracted after the passing of this Act, and the judgment debtor summons must be a summons in respect of a debt contracted, or of a liability incurred after the passing of this Act."

Sect. 232: "This Act shall commence and take effect from and after the passing thereof, as to the appointment of the officers hereby authorized to be appointed, and as to all other matters and things from and after the 11th day of October, 1861."

(2) 32 & 33 Vict. c. 71, s. 118: "No person not being a trader shall be adjudged a bankrupt in respect of a debt contracted before the date of the passing of the *Bankruptcy Act*, 1861."

(3) Law Rep. 20 Eq. 782.

(4) Ibid. 1 H. L. 9. 12 Jur. N.S. 457

C. A. 1875 *Ex parte* RASHLEIGH. *In re* DALZELL. Argument.

this was only a private partnership. One partner cannot make another bankrupt for a partnership debt, until the accounts have been taken by the Court. It is clear that *Dalzell* never could have understood that such consequences would arise from his executing this deed. The partners were dissatisfied with *Dalzell*, and made him give them security, but that is all.

De Gex was heard in reply, but only as to costs, on the question whether the date of the passing of the Act, mentioned in the 118th section of the Act of 1869, meant the 6th of August, when the Act received the Royal Assent, or the 11th of October, when it was to come into operation.

Judgment, James, L.J.

JAMES, L.J. :—

This is an appeal from the decision of the Chief Judge, affirming a decision of the County Court Judge.

The question is whether a non-trader is liable to the bankruptcy laws in respect of a debt contracted in the year 1861. Both the County Court Judge and the Chief Judge were of opinion that the debt must be deemed to have been contracted on the 10th of September, 1861, which was after the passing of the Act of 1861, but before the time appointed for its coming into operation. The Act of 1869 provides that no non-trader shall be made a bankrupt, except in respect of a debt contracted after the passing of the Act of 1861; and the Chief Judge was of opinion, agreeing with the County Court Judge, that, having regard to the whole purview of the Act of 1861, and the Act of 1869, the words "the date of the passing of the *Bankruptcy Act*, 1861," must be translated into "the time of the Act coming into operation." With regard particularly to the costs, it is necessary that we should consider whether that decision was well founded, or whether the Appellant would have been entitled to our judgment upon that point, irrespective of other points of the case.

I am of opinion that in the Act of 1869 the words "the date of the passing of the *Bankruptcy Act*, 1861," mean what they say. They are English words, common words, and words which have a fixed meaning in our language and law. They mean the time when the Royal Assent is given to a bill which has

passed both Houses of Parliament. That is the meaning of the words, and no Court ought to depart from the plain meaning of plain English words, unless coerced to do so by some very serious injustice, a hardship which would arise from a literal interpretation, for instance, where the literal interpretation would, in the opinion of the Court, operate so harshly that the Court would be driven to suppose that there must have been some clerical mistake in the language of the Act, or deed, or whatever may be under consideration. In my opinion there really is no hardship or inconvenience which can be alleged with any force against the literal interpretation of the Act. Non-traders were in 1861 made liable to the bankruptcy law, in substitution for their liability under the previous state of the law, which made them liable to be arrested, and made *quasi* bankrupts through the operation of the Insolvent Debtors Acts, and they had their own distinct liability. It was thought that it would be good for the public, and not bad for non-traders, that they should be made liable to the same procedure in respect to some acts of bankruptcy as persons who were traders. The Act of 1861, which made them liable, said that all debtors, whether traders or not, should be subject to the provisions of the Act, but sect. 69 provided that no debtor who was not a trader should be adjudged a bankrupt, except in respect of some one of the acts of bankruptcy thereinafter described as applicable to a non-trader. One of these acts of bankruptcy is remaining abroad. But there, again, it is provided in sect. 70 that a non-trader shall not be made bankrupt for so doing until the expiration of six months after the passing of the Act.

Before I make some observations upon these two sections, I will refer to the case of *Williams* v. *Harding* (1), in which the noble and learned Lords came to the conclusion that a man who had contracted a debt before a change in the law was not to be liable to the new law. This matter was not before them at the time, but they made use of the term "before the passing of the Act" because they considered it hard that a man should be liable for a debt which he so contracted, without having notice that the change in the law was about to be made. But no such reason would apply to a man who, after the passing of the Act, knew that

(1) Law Rep. 1 H. L. 9.

C. A. 1875 *Ex parte* RASHLEIGH. *In re* DALZELL. Judgment, James, L.J.

in the month of October he would be liable to be made a bankrupt in respect of a debt which he then owed. There would be no hardship in so construing the Act of 1861. True it is that until the month of October proceedings in bankruptcy could not be taken under that Act against a debtor, or against a non-trader, or even against a trader; but if in October there was a debtor who could not pay his debts, and was then liable to the bankruptcy laws, there would be no hardship in saying to him, "You are liable to the bankruptcy laws," and there would be no hardship in saying, "You are liable in respect of the debt which you have contracted when the Act of Parliament has told you what the consequences of contracting the debt would be."

In the same manner the provision as to remaining abroad applies to the passing of the Act. A man could not be made bankrupt under that particular Act of Parliament until the Act came into operation. But if, after the Act was passed in August, he remained abroad six months from the passing of the Act, there was no hardship or injustice in saying to him, "Now the Act has come into operation, you are liable to be made a bankrupt within six months of its passing." That would not seem to be an unreasonable state of things under the Act of 1861.

That being so, we have the Legislature, in 1869, saying, in order not to do an act prejudicial to a non-trader, that he should not be liable to be made a bankrupt in respect of a debt contracted before the date of the passing of the Act of 1861—not before the time of the Act coming into operation, which has nothing at all to do with justice or injustice, reasonableness or unreasonableness towards the man himself—but that he might be made a bankrupt in respect of a debt contracted after the time at which he had full notice that he would be liable to be made a bankrupt in respect of it.

There are the plain words in the Act of 1869 saying that the time is to be measured from the passing of the Act of 1861; and it would be, in my opinion, a most unreasonable view of the whole legislation of 1861 and 1869 to say, and, with deference to the opinion of the Chief Judge, we have no authority whatever for saying, that a date is to be assigned different from that date which we find fixed by the Act of Parliament itself.

Of course that gets rid of a great deal of the evidence before us, and the point would be wholly immaterial if we ascertained, in point of fact, that the deed was executed after the 11th of October. I cannot bring myself to entertain a doubt upon that question of fact upon which, when the matter was partly heard before us on the former occasion, we desired to be further informed, and I held it to be satisfactorily proved that this deed was not executed until some day after the 11th of October.

According to one argument for the debtor, it is utterly immaterial whether the deed was executed before or after the 6th of August, because the debt was really contracted, not by the deed, but during the partnership transactions, and the deed was merely something adopted by way of machinery for settling and adjusting the affairs of the partnership; that, under those circumstances, the debt was to be considered as still the same debt which existed before; that the debt arose out of a contract of partnership, and not out of the contract which was made by the new arrangement. But the original contract of partnership was between certain persons and a man who became a bankrupt, and there was a provisional arrangement for carrying on the partnership. Of course there was no debt at law or in equity which could have been made the subject of action or suit: there was nothing but the liability of a partner to contribute what on winding up the partnership should be found to be due from him to the partnership, having regard to any payments by his co-partners. In that state of things the partners came to a bargain by which, in consideration of something done and something forborne at that time, one partner agreed by deed under seal with two of his partners as trustees for others, to pay certain sums of money. That becomes a clear and precise debt, which is capable of being sued for and recovered immediately in a Court of Law without the necessity of going to a Court of Equity to take the accounts of the partnership or wind up the affairs of the partnership. There was intended to be, and there was created a good legal debt, against which there was no equitable relief. That debt became a perfectly good debt, contracted at the time when the deed was executed, and the debt arose from that time.

C. A. 1875 *Ex parte* RASHLEIGH. *In re* DALZELL. Judgment, James, L.J.

In *Williams* v. *Harding* (1) the case was this, and the good sense of it is obvious:—A man joined a joint stock company, and entered into covenants that he would pay calls. Calls were made afterwards, not by the directors, but by the official manager in the winding-up. It was said, having regard to the deed and the nature of the debt, that the debt itself was to be referred to the original covenant to pay. Of course it was said that that was the contract in respect of which he was sued. But suppose that, instead of taking the simple form of a call from the official manager, the case had been that a call had been made, and then he had said, "I have a claim against the company, but I do not know what the amount may be. I will waive everything of that kind, and I will settle with you for a sum of money, and will give you a covenant to pay that sum of money before six months hence, and a mortgage to secure the payment." It is impossible to say that, within the principle of *Williams* v. *Harding*, that would not have been a new debt or bargain with the liquidator.

That is the case here. It is a new debt contracted with the partners with whom the debt arose. I am of opinion that there was a new debt contracted after the passing of the Act, and therefore that the judgment of the Chief Judge ought to be varied, and that his order directing the costs of the appeal to him to be paid by the present Appellant must also be discharged. If any costs were given against the Appellant in the County Court, that order also must be discharged. The Appellant will be entitled to the costs in the first Court; but we give no costs of the appeals.

Mellish, L.J. MELLISH, L.J.:—

I am of the same opinion. The 118th section of the Act of 1869 appears to me a perfectly easy section to construe, and the words must be taken in their natural sense. But it is said that in the 90th section of the Act of 1861, for which the 118th section of the Act of 1869 is a substitute, the words "after the passing of this Act," are used in the sense of "after this Act comes into operation." Certainly, if that could be made out, there would be considerable grounds for contending that if during the time when the Act of 1861 was in operation a non-trader could not be made a bankrupt,

(1) Law Rep. 1 H. L. 9.

C. A.
1875
Ex parte RASHLEIGH.
In re DALZELL.
Judgment, Mellish, L.J.

or have a debtor's summons issued against him in respect of a debt contracted between the passing of the Act of 1861 and the time when that Act came into operation, then it would have been rather an extraordinary thing that that should have been introduced for the first time in the Act of 1869. But, in my opinion, the 90th section of the Act of 1861 has not that construction. We are to consider the 90th section and the 232nd section together, and strive to reconcile them with each other; but, unless they do in terms contradict each other, each must have its proper and natural meaning. If it rested upon the 90th section alone, of course the thing would be perfectly plain, because it simply says that the debt must be a debt contracted after the passing of the Act. But then the 232nd section says that the Act shall commence and take effect from and after the 11th day of October, 1861. That appears to me to mean that nothing which is authorized to be done under that Act can be done till after the 11th of October, 1861. But that is all it says. It follows that the 90th section is so far modified that no creditor could present his petition until after the 11th of October, 1861, neither could a judgment debtor's summons be taken out against a debtor until after the 11th of October, 1861, because the presenting of a petition in bankruptcy or the taking out of a judgment debtor's summons would be something done under the Act. But, to my mind, it does not follow that nothing may be done in respect of a debt incurred after the passing of the Act, nor does it follow that the words "after the passing of this Act" are not to be read in their natural signification.

The object of the Legislature plainly is, that, though at the time when the debtor contracted his debt it was not the law that he should be made a bankrupt in respect of that debt, it would enable him to be made a bankrupt in respect of that debt. If the debt was contracted after the time of the passing of the Act, he had sufficient notice, and there is no injustice to the non-trader in saying that the commencement of the Act should be the time to which his debt was to be referred, in order to enable him to be made a bankrupt. Therefore there does not appear to me to be any reason why the two sections should not stand together, interpreting each of them according to the plain and natural meaning

C. A. 1875

Ex parte RASHLEIGH. *In re* DALZELL.

Judgment, Mellish, L.J.

of the words. In other sections the phrase "from the passing of the Act" occurs, but I do not know that, even if there were any section where these words had been improperly used, the Court could say that that was a reason why the 90th section should be so construed.

Then, with respect to another point which Mr. *Karslake* has argued, the question arises, when was this debt contracted? It was contracted when the debtor contracted to pay it. When did the debtor contract to pay it? Certainly at the time when he executed the deed. In my opinion, it is not necessary to decide in this case whether, if a person contracted a simple contract debt, and afterwards turned that simple contract debt into a specialty debt by covenant, taking further time for payment as a consideration, there would not be a fresh debt contracted within the meaning of the Act at the time when the covenant was entered into. In my opinion, that question was not decided in the case of *Williams* v. *Harding* (1), because in that case the only contract which the debtor had ever entered into was the contract when he signed the deed of settlement. Therefore that case does not affect the question, even if there was first a simple contract debt, and then afterwards a specialty debt contracted, with a new covenant in respect of that debt.

But in this case there really was no debt until the deed was executed. There were several persons in partnership. Two of the partners had largely overdrawn their accounts. No doubt, when the partnership came to be wound up, then on the balance of account some questions might arise, but in my opinion there was not a then existing debt. But when the accounts were balanced, a particular sum was agreed upon; but then, with respect to that sum, a covenant is entered into to secure it, and time is given for payment. I am clearly of opinion that that was contracting a debt. Therefore, I agree that in this case the judgment debtor's summons ought not to have been discharged.

Baggallay, J.A.

BAGGALLAY, J.A.:—

I am of the same opinion. [His Lordship then stated the evidence as making it clear that the deed was not executed till after the 11th of October.]

(1) Law Rep. 1 H. L. 9.

Then a further point was raised, that the debt was a debt contracted at an earlier period. Whatever may have been the proper description of the liability which the parties had incurred between one another prior to the 10th of September, 1861, or prior to the time when the deed was executed, one thing is abundantly clear—the recitals of the deed shew that any claims which one partner might have on the other in respect of those antecedent liabilities were put an end to. It was intended by both parties that a debt (I cannot consider it a new debt, because, in my opinion, there was no previous debt,) should be created as from the date of the execution of that deed, and should be treated as a certain capital sum with interest to be computed from that particular period. It appears to me that the date of the deed was only important because it enabled the present amount of capital to be fixed, and the precise amount of interest to be determined.

This would have been sufficient to decide this appeal in favour of the Appellant; but it became necessary, for the purpose of disposing of the costs of the proceedings, to consider whether the present decision in favour of the Appellant has not wholly arisen out of the additional evidence which he has been allowed to adduce since the appeal was first before us. It is, therefore, important to see whether the argument which was addressed by him to the Chief Judge, as regards the passing of the Act of 1861, was well founded or not.

Having regard to the 118th section of the Act of 1869, which refers distinctly to a debt contracted before the passing of the *Bankruptcy Act*, 1861, I can see no reason why those words should not receive their ordinary interpretation, unless by referring to the Act of 1861 something can be found which shews that they should receive either in equity or at law some different interpretation. I am unable to find anything of the kind in the Act of 1861. On the contrary, it appears to me that the Act itself contains within it the proper construction to be put upon these words; for although the Legislature has used in an earlier section the expression "the passing of the Act" in a way which might have led to some question or doubt, yet the two expressions, "commencement" and "passing" are brought into juxtaposition in the 232nd section, and are actually used in perfectly distinct senses. There is,

C. A. 1875 *Ex parte* RASHLEIGH. *In re* DALZELL. Judgment, Brett, J.

therefore, a clear interpretation in the Act as regards the two words.

As regards the question of the costs, I entirely agree.

BRETT, J.:—

I am of the same opinion.

[His Lordship then stated the facts of the case and the evidence as shewing that the deed must have been executed in the month of November.]

But then it was argued with considerable force, that, even supposing that to be so, still, as you may look beyond the judgment to see when the debt was contracted, you may also look beyond the covenant which was made after October, and see whether that covenant was not made in respect of a debt contracted before the passing of the Act of 1861.

Supposing that there had been a simple contract debt before the statute, which after the passing of the statute was turned into a specialty debt, I have a strong opinion as to whether there would be a debt contracted after the statute or not. But I do not think it right in the present case to determine that point, because it is not necessary. I have, indeed, a very strong opinion that in the present case there never was a debt of any kind upon which any proceedings could be taken as on a debt until that covenant was entered into. There were, no doubt, partnership claims between the partners and partnership liabilities between the partners, but they were not ascertained; and there never was such a debt until this covenant had been entered into. Therefore it seems to me that this point cannot be maintained.

If that be so, then upon the facts before the Court it becomes, except as to a question of costs, wholly immaterial to consider whether the decision of the Chief Judge in the Court below was right; but inasmuch as the question which party may be liable for certain costs, or may be relieved from certain costs, does depend upon whether the judgment of the Chief Judge was right, it seems necessary to determine that question.

If his judgment be wrong with regard to the day, then his judgment with regard to the question of the future advances becomes immaterial. Therefore I desire to express no opinion whatever upon the question whether the future advances could make a debt

after the passing of the Act, or whether the covenant under which they were made was broken. I think it unnecessary to pass any opinion upon that point, and unnecessary therefore to say what is the effect of the judgment in *Williams* v. *Harding* (1) upon the question of the future advances, because I agree that the decision which has been come to by the Chief Judge upon the construction of the 118th section of the Act of 1869 is one which cannot be supported. According to the plain meaning of the words, the debt was contracted after the passing of the *Bankruptcy Act*, 1861. It is not denied by anybody that the Act of 1861 was passed in August, but it is said that by reason of a certain section in that Act the Court is to say that the term "the passing of the *Bankruptcy Act*, 1861," does not mean what it would mean in the ordinary construction of those words, but means the time at which the statute shall come into effect. I think the canon of construction here is, that you must construe the 118th section according to its ordinary grammatical terms, unless such a construction would produce either an absurdity or a great injustice, so that it must be inferred that the Legislature did not mean to use the words in the ordinary sense. I can see no injustice in so construing the Act of 1861, as to say that a person who contracted a debt between the time of the passing of the Act and the time when the Act came into operation might be made a bankrupt when the Act commenced and took effect. It seems to me that there is nothing unjust or absurd in holding that the 118th section of the Act of 1869 must be read according to the ordinary meaning of the words; and reading it according to what would be its ordinary grammatical effect, I come to the conclusion that it means the date of the passing of the Act and not the date of the Act coming into operation.

Therefore I think that upon that point the judgment of the Chief Judge cannot be supported. If so, then this becomes properly, and in the strictest sense as to that part of the judgment, a successful appeal, and the judgment of the Chief Judge being held to be wrong, then the decision which the Lord Justice has pronounced with regard to costs necessarily follows.

Solicitors for the Appellant: *Rashleigh & Smart.*
Solicitors for the Respondent: *Rickards & Walker.*

(1) Law Rep. 1 H. L. 9.

Approved. *In re* McGREAVY [1950] 1 Ch. 269

Dictum of COCKBURN, C.J., at p. 25, *not applied.* *Re* McGREAVY. [1950] 1 All E.R. 30.

Dictum of COCKBURN, C.J., at p. 25, *explained.* *Re* McGREAVY. [1950] 1 All E.R. 442.

Not followed. *In re* McGREAVY [1950] 1 Ch. 150

C. A.

1876

Jan. 20, 21.

Ex parte MUIRHEAD. *In re* MUIRHEAD.

Bankruptcy—Petitioning Creditor's Debt—Damages in Divorce Suit— 20 & 21 *Vict. c.* 85, *s.* 33.

Post 423-4

In a divorce suit a decree for a divorce was made, and the co-respondent was ordered to pay into the registry £5000, the amount of damages assessed by the jury. This decree was made absolute. The co-respondent being resident abroad, the order for payment could not be enforced against him, and an order was obtained from the Divorce Court rescinding so much of the decree as ordered payment into the registry, and ordering the £5000 to be paid to the husband, he undertaking to pay it into the registry to abide the further order of the Court. The husband then commenced proceedings in bankruptcy against the co-respondent:—

Held (reversing the decision of the Registrar), that the £5000 did not constitute a good petitioning creditor's debt.

Statement.

THIS was an appeal by *R. D. S. Muirhead* from an order of adjudication made by Mr. Registrar *Murray*, sitting as Chief Judge.

In November, 1872, Captain *Otway* presented a petition for divorce, to which *Muirhead* was the co-respondent. On the 23rd of July, 1874, a decree *nisi* for dissolution of the marriage was made with costs, and *Muirhead* was thereby ordered, within ten days from service of the decree, to pay into the registry £5000, the amount of damages assessed by the jury. Personal service of the decree could not be effected, and an order for substituted service was obtained, and on the 2nd of February, 1875, the decree was made absolute. *Muirhead* had gone abroad, and was residing there.

On the 1st of June, 1875, an order was obtained from the Divorce Court ordering that so much of the order of the 23rd of July, 1874, as ordered *Muirhead* to pay the £5000 into the registry should be rescinded, and ordering him, within ten days from the service of the now stating order, to pay the £5000 to Captain *Otway*, he undertaking that he would, immediately on the receipt thereof, pay the same into the registry to abide the further order of the Court, and it was ordered that Captain *Otway* should pay the same into the registry accordingly.

On the 9th of August, 1875, after the expiration of ten days from

C. A.
1876
Ex parte MUIRHEAD.
In re MUIRHEAD.

service of the order, Captain *Otway* presented a petition for adjudication in bankruptcy against *Muirhead*, the petitioning creditor's debt being the £5000, and the act of bankruptcy the remaining out of *England* with intent to defeat or delay his creditors.

On the 3rd of December *Muirhead* was adjudged bankrupt, and now appealed from the adjudication.

Argument.

Benjamin, Q.C., and *Finlay Knight*, for the Appellant:—

We say there is no good petitioning creditor's debt. There is no debt due to the husband; he is a mere officer of the Court *pro hâc vice* to get in the damages; he is nothing but a conduit-pipe. The damages do not belong to the husband, for under 20 & 21 Vict. c. 85, s. 33, they are to be applied as the Court shall direct, and the husband is not a creditor for them except so far as the Court gives them to him. The mode in which the decrees of the Divorce Court are to be enforced is prescribed by sect. 52 of the Act, which is interpreted by *Clarke* v. *Clarke* (1). Power to sue a person does not necessarily carry with it a right to make him a bankrupt: *Guthrie* v. *Fisk* (2). An official manager, to whom calls are ordered to be paid, cannot be a petitioning creditor: *Williams* v. *Harding* (3); and the present case is analogous.

[THE COURT then called on the Respondents.]

Davey, Q.C., and *Lumley Smith*, for the Respondents:—

We submit that there is a fallacy in the Appellant's argument when he treats the case as if payment was ordered to an outsider as an officer of the Court. This sum was recovered in an action brought by the husband for a wrong sustained by him, an action which he was at liberty to bring or not to bring, in which he was *dominus litis*, and which he might, without rendering himself accountable to any one, have abandoned at any time. Even now it lies with him whether he will enforce the judgment or not. The Act does no more than give the Court power to intercept the damages and take them away from him.

[MELLISH, L.J.:—Has he any title whatever to the damages except under the order of the Court? In the old actions for

(1) Law Rep. 3 P. & D. 57.
(2) 3 B. & C. 178.
(3) Law Rep. 1 H. L. 9.
12 Jur. N.S. 457.

C. A. 1876

Ex parte MUIRHEAD. *In re* MUIRHEAD.

criminal conversation it was not the verdict of the jury, but the judgment of the Court, that gave the Plaintiff a right to the damages.]

Argument.

We put the case thus—that the husband is a judgment creditor subject to an obligation, which may be looked upon as analogous to equity to a settlement, or to a trust. Sect. 33 leaves it to the husband's option whether he will claim damages or not. It speaks of damages to be recovered, *i.e.*, recovered by the husband, and then gives a power to the Court to intercept them. Captain *Otway* is in a very different position from a receiver, for a receiver can only proceed in the name of another person. *Guthrie* v. *Fisk* (1) seems to adopt a very narrow construction. *Williams* v. *Harding* (2) goes on the ground that no debt was due to the official manager, but only to the persons with whom the debtor contracted. *Pritchard* v. *Pritchard* (3) supports our case.

[MELLISH, L.J. :—In that case the Petitioner was not put under any terms.]

In *Patterson* v. *Patterson* (4) an order similar to the present was made, except that there was no direction for the husband to bring the money into Court, and the husband was allowed to prove: *Ex parte Langridge* (5).

[MELLISH, L.J. :—A person may be appointed to prove: *Ex parte Hare* (6); but becoming a petitioning creditor is another matter.

JESSEL, M.R. :—What constitutes a creditor ?]

A definition is given by sect. 60 of the *Bankruptcy Act*, 1869.

Judgment, L.C.J.

COCKBURN, L.C.J. :—

Upon the first point, which is the only one we have thought it necessary to have argued before us, viz., whether there was a good petitioning creditor's debt, I am of opinion that the order for adjudication in this case was made in error, and should be reversed.

(1) 3 B. & C. 178.
(2) Law Rep. 1 H. L. 9.
(3) Ibid. 2 P. & M. 53.
(4) Law Rep. 2 P. & M. 189.
(5) 19 W. R. 951.
(6) Law Rep. 10 Ch. 218.

The facts are that a suit has been instituted by Captain *Otway* for a divorce, with a claim for damages against Mr. *Muirhead*, by reason of his adultery with his wife, at that time Mrs. *Hughes*. A divorce has been pronounced, and by the verdict of the jury the damages against the co-respondent have been assessed at £5000. In respect of that £5000, an order was first made that the money should be paid into court by the co-respondent. That is an order quite in conformity with the usual practice of the Court, but it so happened that *Muirhead*, the co-respondent, was living abroad, and out of the jurisdiction of the Court, and consequently could not be compelled by process issuing out of the Court to pay the amount. The Petitioner then had recourse to proceedings in bankruptcy. I do not at all blame the Petitioner, or those who advise him, for trying whether this form of remedy could be made effectual for obtaining the damages. He had a perfect right to make the trial, but the question is whether that particular form of procedure could be resorted to with success. I am of opinion that it could not, as I think that the order which has been made by the President of the Divorce Court has not created a good petitioning creditor's debt. It is quite clear that the award of damages by a jury in an action at law, without a judgment, or an award of damages by a jury in such a proceeding as this suit in the Court of Divorce, without an order of the Court giving effect to the verdict, would not afford a ground of action, or constitute a good petitioning creditor's debt; but it is said that the order of last June has the effect of a judgment, and converts that which would not be a good petitioning creditor's debt into a good petitioning creditor's debt. Now in order to constitute a good petitioning creditor's debt, you must have that which may be the immediate subject of an action at law or suit in equity. What have we here? An order for payment of a sum to which Captain *Otway* had no title at law or in equity. It would be necessary for him, if the co-respondent were to pay him the amount, to pay it into the registry of the Court of Divorce, to be dealt with as the Court should direct. It was not the intention of the order, nor is it the effect of the order, that the money shall be presently paid as compensation to the Petitioner, Captain

C. A. 1876

Ex parte MUIRHEAD. *In re* MUIRHEAD.

Judgment, Cockburn, L.C.J.

Otway. He is merely to receive the money and pay it into Court, and he can take no process for the purpose of enforcing the payment for his own benefit. The only process which the Divorce Court would award him, if it could get the Defendant within its jurisdiction, would be a process to compel the latter to pay the money to him for the purpose of its being paid into Court, there to be made available as the Court should direct. Under those circumstances, I think the expression used by Mr. *Benjamin* the other day is a very good and apt one—he is simply the conduit-pipe of the Court, or, to use an expression still better adapted to the circumstances of the case, and which was used yesterday by the Master of the Rolls, he is in the position of a receiver. If the Court, instead of ordering the money to be paid, in accordance with the usual practice of the Court, into the registry, has the power (upon which I must not be understood as pronouncing any opinion) of ordering payment in this way, that is, to order it to be paid to the Plaintiff in the suit, or to any other party, for the purpose of its being brought into the registry—as to which I see no difference between the position of the Plaintiff in the suit and any other person whom the Court might employ for the purpose—it is clear that such a person is only a receiver, and could not apply the money to his own use, but would be bound to bring it within the power of the Court, in order that the Court might exercise its functions with respect to it. That being so, it appears to me that this is not a good petitioning creditor's debt. It certainly is not at law a good petitioning creditor's debt, nor, so far as I understand the matter, is it a good debt in equity. It is nothing more than an order to bring the money into Court, and when it is brought into Court *non constat* that the Plaintiff, who up to the time of getting the verdict was *dominus litis*, will get a single shilling of it. It is in the power of the Court to direct that the whole amount shall be applied to the maintenance of the wife and children. It is impossible to say under these circumstances, where a man has not a present and certain interest in the debt, that he has such a debt as can be made the foundation of bankruptcy proceedings.

I was a little impressed at first with the case of *Patterson* v.

Patterson (1), which has been referred to, but I confess I look upon that case not without considerable doubt as to the power of the Court to make such an order as was made there. But passing that by, it is sufficient, I think, to say that that case does not in any way meet the present, because it was a case in which all that was done was for the purpose of enabling the party to prove. Whether that ought not to have been done by the Court of Bankruptcy, if done at all, I think is a very serious question, and I entertain considerable doubt whether the Divorce Court had the power it assumed to exercise in that case. That is not, however, the present case. There it was wanted merely for the purpose of proof. That is very different from constituting a person a good petitioning creditor. A person may be appointed to prove who is not in the position of a petitioning creditor. I think this gentleman was not in that position, that he had no present interest which he could enforce for his own benefit, that he was only the organ of the Court, and that, consequently, there was not enough to constitute him a good petitioning creditor.

Judgment, Cockburn, L.C.J.

MELLISH, L.J. :—

Mellish, L.J.

I am entirely of the same opinion. It is admitted that if the second order had not been made, but only the first order, there would be no good petitioning creditor's debt, and for a very obvious reason, that although the effect of the order would be to make the sum certainly payable, it would leave it entirely uncertain for whose benefit the sum would be ultimately received, and therefore it would not be a liquidated debt due either at law or in equity to any particular person.

Then, does the second order alter the case? I have great difficulty in seeing how it can. There is no real difference in this case between the right at law and the right in equity. The right is given by the statute, and the Court, whether it be a Court of Law or a Court of Equity, must determine the meaning of the statute; and after the second order was made the sum still remained in the same position as it was under the first order, that is

(1) Law Rep. 2 P. & M. 189.

C. A. 1876 *Ex parte* MUIRHEAD *In re* MUIRHEAD. Judgment, Mellish, L.J.

to say, it remained a sum of which neither the whole nor any fixed portion is certain to be ultimately received by Captain *Otway*. Neither, in my opinion, is he a trustee. I quite agree that if a sum is due at law to a person as a trustee, and he is acting in accordance with his trust in presenting a petition, he may present that petition, and there would be in that case a good petitioning creditor's debt; but here I cannot see that any sum is due at law any more than in equity. It appears to me that the Court, whether at law or in equity, must look at the terms of the Divorce Act, and, looking at the terms of the Divorce Act, I cannot help seeing that there is no certain sum due to Captain *Otway*. I do not mean at all to express any dissent or any express opinion as to the effect of such an order for the purpose of enabling a proof to be made. As at present advised, I should rather think that, there being a sum presently payable, and an order for its payment, it would in some shape be proveable in bankruptcy, and that the mere uncertainty as to who was ultimately to receive it, and for whose benefit it was ultimately to be applied, would not prevent its being a proveable debt. This uncertainty would, however, in my opinion, prevent any particular person from being a good petitioning creditor for the purpose of presenting a petition in bankruptcy, because, in order that there may be a good petitioning creditor's debt, the sum must be a certain sum, certainly due and certainly payable to the person who presents the petition.

JESSEL, M.R., and BAGGALLAY, J.A., concurred.

Solicitors: *Ellis & Ellis; Linklater & Co.*

In re MARQUIS OF SALISBURY AND THE ECCLESIASTICAL COMMISSIONERS.

C. A. 1875 Dec. 9. 1876 Jan. 29.

Guardian—Places of Worship Sites Act, 1873 (36 & 37 *Vict. c.* 50), *s.* 1.

Held, by *James* and *Mellish*, L.JJ., and *Blackburn*, J. (reversing the decision of the Master of the Rolls), *dissentiente Baggallay*, J.A., that a father who was a tenant for life of a settled estate could, as guardian by nature of his infant son, who was entitled to the inheritance in remainder, concur on the son's behalf in a grant by himself of part of the settled estate as a site for a church, under 36 & 37 Vict. c. 50, s. 1.

Statement.

THIS was an appeal by the Marquis of *Salisbury* from a decision of the Master of the Rolls in a case stated for the opinion of the Court under the *Vendor and Purchaser Act*, 1874, s. 9.

The Marquis of *Salisbury*, being entitled to the family estates as tenant for life, agreed, by virtue of 36 & 37 Vict. c. 50 (the *Places of Worship Sites Act*, 1873), s. 1, to grant a piece of land, part of the settled estates, to the Ecclesiastical Commissioners as the site of a church. The first estate of inheritance was vested in the eldest son of the Marquis, Viscount *Cranborne*, an infant fourteen years of age, who was entitled in remainder immediately expectant on the life estate of the Marquis; and the question was whether the Marquis, as the natural guardian of his son, was his guardian within the meaning of the Act, so as to enable him to concur on his son's behalf. The Master of the Rolls held that he was not (1).

Argument.

J. Pearson, Q.C., and *W. W. Karslake*, for the Appellant:—

The Act evidently is framed on the view that every infant will have a guardian. The father is the guardian by nature, and during his life no one else can be guardian; for, though the Court of Chancery has sometimes prevented a father from having the custody of his children, it has never appointed another person guardian, but has only nominated some one to act as guardian. The Act provides no means of appointing a guardian for this purpose, so if the father is not guardian within the meaning of the

(1) Law Rep. 20 Eq. 527.

C. A. 1875 — *In re* MARQUIS OF SALISBURY AND THE ECCLESIASTICAL COMMISSIONERS.

Act, its object will, in a vast number of cases, be defeated; for generally where a grant of this kind is proposed, the tenant for life has a son who is tenant in tail, and very frequently a minor. The Legislature may well be supposed to have considered that a father would sufficiently protect his son's interests in a matter of this trifling description.

The reasoning in *Morgan* v. *Dutton* (1) applies.

Argument.

Hastings, Q.C., for the Commissioners :—

The usual practice under the Act has been to appoint the father guardian upon application in Chambers supported by an affidavit of the propriety of the proposed grant. A father is not in strictness a guardian, *Eyre* v. *Countess of Shaftesbury* (2), and cannot be considered such within the meaning of this Act.

[JAMES, L.J., referred to *Butler*, Co. Litt. (3), and BLACKBURN, J., to Com. Dig. "Guardian," and the statute 12 Car. 2, c. 24.]

Supposing the father to be guardian, still it is submitted that he is not such a guardian as the statute contemplates—a guardian of the estate must be meant. In cases under the *Settled Estates Act* (19 & 20 Vict. c. 120), the Court has the power of appointing a guardian.

[JAMES, L.J. :—In that case there is something in the nature of a *lis pendens*.]

A testamentary guardian is held not to be a guardian within the meaning of that Act: *In re James* (4). The *Schools Sites Act* (4 & 5 Vict. c. 38), s. 2, requires the consent of a remainderman only when he is legally competent to give it. Here the consent of a guardian is required in the case of a minor, and it was intended that the minor should have some protection. The construction contended for on the other side leaves the Act to operate in substantially the same way as if no consent on behalf of an infant tenant in tail had been required.

J. Pearson, in reply.

(1) 9 Mod. 135, 142.
(2) 2 P. Wms. 102.
(3) 88 b, note 12.
(4) Law Rep. 5 Eq. 334.

1876. Jan. 29. JAMES, L.J.:—

C. A.
1876
In re MARQUIS OF SALISBURY AND THE ECCLESIASTICAL COMMISSIONERS.
Judgment, James, L.J.

By the Act 36 & 37 Vict. c. 50, it is recited that it is expedient to afford greater facilities for granting sites for buildings for religious worship and for burial places.

To effect this object it is enacted that, amongst others, a tenant for life in possession may grant for those purposes any quantity not exceeding one acre, not being part of any demesne or pleasure ground attached to a mansion-house, or any number of such sites, provided that each such site does not exceed one acre. But with the further proviso that no grant by a mere tenant for life shall be valid "unless the person next entitled to the same for a beneficial interest in remainder in fee simple or fee tail (if legally competent) shall be a party to and join in the same, or if such person be a minor, or married woman, or lunatic, unless the guardian, husband, or committee of such person, respectively, shall in like manner concur."

In the case before us, the Marquis of *Salisbury*, being tenant for life, is minded to convey a site to the Ecclesiastical Commissioners for the purposes of the Act.

The next tenant of the inheritance is Lord *Cranborne*, the Marquis's eldest son and heir apparent, a minor. And the question before us is, whether the Marquis, as tenant for life, and acting also as guardian for his minor son, can make a valid grant of such site.

Now, beyond all question, the Marquis is in some sense, and to some extent at all events, the guardian of his son.

By the law of *England* a father has the guardianship and custody of his children; and in old times, when it was of more practical importance than it is now, it was settled that, in respect of the eldest son and heir apparent, the father was especially the guardian.

It is not, we think, to be doubted that the power given by statute to a father to appoint a guardian to his children after his death was so given because such guardianship was considered to be his by inherent right during his life, and it was thought proper to enable him to continue after his death the same guardianship in his nominees or delegates.

It is true that the Court of Chancery has, on behalf of the

C. A. 1876

In re MARQUIS OF SALISBURY AND THE ECCLESIASTICAL COMMISSIONERS.

Judgment, James, L.J.

Crown as *parens patriæ*, a right to appoint guardians where there are none, and in special cases (of which there are very few on record) to remove an infant from the guardianship of the father or the testamentary guardian appointed by him. But in the latter cases, while it controls or supersedes the legal right on equitable grounds, it always recognises such legal right, and does not appoint a guardian, but appoints a person to act as guardian.

For special purposes, and for the more effectual protection of infants, the Court makes them its wards without removing them from the guardianship of the father or testamentary guardian. In matters of litigation a guardian *ad litem* is appointed for the mere purpose of defending the suit on behalf of the infant, such appointment being made by the Court, whatever it is, in which the proceedings are, and confined to the particular suit. It is, in fact, a technical contrivance to get rid of the technical inability of an infant to appoint an attorney. In many matters, not of litigation but of application to the Court for its sanction or direction, a guardian in the nature of a guardian *ad litem* is under express statutory authority appointed to represent the infant. The Act in question here, dealing with such a small matter as four roods of ground, and intending to give facilities, does not (in terms, at all events,) require in any case the sanction of the Court, and does not contain any machinery for enabling the Court to appoint a guardian to represent the infant, or to act in any way on behalf of the infant.

Has the infant in this case a guardian, and if so, who is his guardian? It seems to me clear that if this were asked as a mere general question, irrespective of the provisions of any Act of Parliament, the natural answer would be, his father is his guardian, and he has no other guardian. And if some one else had been the tenant for life, it could not, I think, be doubted that a conveyance by such tenant for life, with the concurrence of the father as the guardian of his minor son, would be considered the obvious and natural mode of giving effect to the statute. Can it make any difference that the same individual fills the two characters? There is nothing in the Act which says that two distinct individuals should exercise their judgment on the matter and concur. What the Act requires is, that the owners or representatives of

the two interests, the estate for life and remainder, should concur. It frequently happens that the same individual man should fill two characters, should be in law two persons, *e.g.*, should be heir-at-law and legal personal representative, trustee with a power and tenant for life whose concurrence is requisite to the exercise of the power, patron and ordinary, and in legal instruments he would be made a distinct party as a distinct person in each character. In the case before us the technical form of the conveyance would be between *A.*, tenant for life, of the first part, the said *A.* as guardian of *B.*, a minor, of the second part, and *C.*, the grantee, of the third part, and would be expressed to be a grant by *A.* as tenant for life, and a confirmation and concurrence by *A.* as guardian. In such a case the words of the proviso would be literally complied with, there would be the requisite concurrence of the guardian of the minor. Is there anything in this inconsistent with the spirit, as it is sometimes called, or more properly, with the true intent and meaning of the Act? Let us consider for a moment what a number of cases would be affected by such a view.

It may very well, and often does, happen that the tenant for life, being sonless, should be himself the next actually existing remainderman in tail or in fee. A grandfather or mother tenant for life might well be the testamentary guardian of the grandson or son, the remainderman. A tenant for life might be the husband of a remainderwoman, or still more probably, the committee of a lunatic. Is there any reason for holding that in these cases there is such an incompatibility, such a conflict between interest and duty, or between personal inclination and duty, that the Court would rather bring the whole matter to a dead-lock than suppose that the Legislature could have intended to sanction such an incompatibility or conflict?

The Act is making provision for what was thought a public good. The Legislature was minded to prevent the difficulties and the disproportionate expense which our system of strict settlement and conveyance threw in the way of effecting that public good. The fact that such system does create such difficulties and expense is an evil, and may be made an opprobrium, and it is in accordance with the whole spirit of our Legislature to protect the system itself by giving sufficient practical remedies for substantial prac-

C. A. 1876 *In re* MARQUIS OF SALISBURY AND THE ECCLESIASTICAL COMMISSIONERS. Judgment, James, L.J.

tical evils which are found occasionally to exist. It therefore provided a cheap and simple means of unfettering a fettered estate sufficiently for the object in view. At the same time it wanted, even with so small a property as an acre or less, to have some safeguard for the rights of remaindermen.

It thought, however, that if the interest of the next actual remainderman in fee or in tail was represented, that would be sufficient, and that such representation in so small a matter might well be by a guardian, or a committee, and it made no especial provision for the case of the tenant for life being such guardian, husband, or committee. Nor does there seem any substantial reason why it should have made such a provision. A tenant for life even, although minded to let his neighbours have a site for religious worship or burial place at a moderate price, or gratuitously, might well be trusted to do his duty to his child, or wife, or lunatic ward, just as any other father, or husband, or committee would do. It does not seem that there is any sufficient reason for the Court to imply in the proviso a restriction or qualification that is not to be found expressed, and read it thus: "Unless the person next entitled being a different person from the tenant for life shall be a party to and join in the same, or unless the guardian, husband, or committee, being a different person from the tenant for life shall in like manner concur."

It is suggested, no doubt, that the Act need not be made inoperative in such a case as that before us, that the Court of Chancery would, either by implication derived from the Act itself, or from its inherent general power, have authority to appoint a guardian. But it appears to me that it is impossible to find any such implication in the Act, and I know not on what principle, or in what manner, such supposed general power is to be exercised.

Is there to be a general guardian appointed superseding or interfering with the father's rights because he is minded to do a kind thing to his neighbours? Is he to be appointed guardian of the infant's estates? What is the meaning of such guardianship as applied to estates in remainder, possibly remote or contingent, and almost certainly defeasible if the infant should die an infant? Is he to be appointed a guardian of the few roods only, or a guardian for the particular purpose of consenting to or dissenting

from the particular grant? If so, on whose nomination or request is he to be appointed, and what would be his duty, and what his responsibility? Is he to act with the sanction and under the direction of the Court? He would hardly be advised, or safe, to act without it. And this would be a very singular and clumsy way of arriving at a result which would have been very simply obtained by enacting that in all cases of infants the sanction of the Court should be obtained; a provision very simple, but hardly consistent with the professed intention of the Legislature to facilitate gifts or sales for the purposes indicated.

The contrary view taken of the Act appears to me to proceed from the assumption, that in the proviso in question the Legislature was acting itself on the assumption that it was necessary or desirable to have some effectual check in all cases on the reckless or improvident bounty of the tenant for life. I cannot think that this ever could have been thought necessary as between a tenant for life and his own infant son, his heir and successor, in such a matter as this. It might well be that a sonless man, knowing that the estates were to go over to some distant kinsman, might be reckless of the feelings, the wishes, and interests of such kinsman, but surely not as to an infant son, bearing this always in mind, that the infant son who is thus to be protected against the too facile bounty, the religious weakness of his father in a matter of four roods of ground, is under the absolute power and control of his father in respect of his own secular and religious education.

The conclusion I have arrived at is that a conveyance executed by the Marquis in his own right as tenant for life and as guardian of his minor son, would be a valid conveyance.

MELLISH, L.J.:— Mellish, L.J.

I agree with the judgment of Lord Justice *James*, and with the reasons he has given for it. The Legislature appears to me to have assumed that every minor either has or may have a guardian, just as every married woman must have a husband, and every lunatic either has or may have a committee, and as the husband of the married woman and the committee of the lunatic mean the persons who have acquired the status generally of husband or committee, so I think the guardian of the minor means the person who

C. A. 1876

In re MARQUIS OF SALISBURY AND THE ECCLESIASTICAL COMMISSIONERS.

Judgment, Mellish, L.J.

holds the status of guardian generally. Now a minor, whose father is alive, neither has nor can have any guardian except his father. In extreme cases, the father may be deprived of his guardianship, but even in those cases the person to whose custody the minor is committed in place of the father is not styled the guardian of the minor. If, indeed, an action is brought against a minor, or a minor has to be made a party to any proceedings in a Court of Justice, a guardian *ad litem* may be appointed, but such person does not thereby become the guardian of the minor generally. I am therefore of opinion that, according to the plain and natural meaning of the words used by the Legislature, the father is the guardian of every minor whose father is alive.

Then, does any such inconvenience or absurdity follow from holding the father to be the guardian meant by the statute, as to compel the Court to adopt some other construction? It is said that it does, because the father, though he is the guardian of the person, is not the guardian of the estate of the minor, and because where the father is tenant for life he is the person against whom the estate of the infant is to be protected. These objections assume that the Legislature have required the assent of a minor to be given by his guardian, in order to protect the estate of the infant. It is obvious, however, that whoever may be the guardian, he cannot be intended to be a trustee who will be guilty of a breach of trust if he parts with the estate of the infant, because one of the things which the guardian unquestionably may do is to consent to a gift being made of the property of the minor.

The object of the Legislature is to enable lands which are in settlement to be applied for the purposes of the Act. They intended the Act to apply to a case where there is a tenant for life of land, and where the person next in remainder in fee or in tail is a minor, and they had to consider who should give consent on the part of the minor.

There were two cases to be considered, one in which a father would be tenant for life, and his eldest son the person next in remainder; the other in which the tenant for life would be childless, and the person next in remainder in fee simple or fee tail would be a more or less distant relation. I can see no absurdity in the Legislature coming to the conclusion, that where the tenant

in remainder was the son of the tenant for life, the father might be trusted not unduly to disregard the interests of his minor son, but that where the father was childless, and the tenant in remainder was a distant relative, there would be more risk of the interests of the tenant in remainder being unduly sacrificed, and that he ought to be protected by the consent of his own father or other guardian being required.

BAGGALLAY, J.A.:—

Judgment, Baggallay, J.A.

I have the misfortune, in this case, to differ in opinion from the Lords Justices and Mr. Justice *Blackburn*.

The substantial question involved in the appeal is, whether the father of an infant tenant in tail is a guardian of his son within the intent and meaning of the 1st section of the *Places of Worship Sites Act*, 1873, and, as such guardian, competent, for the purposes of the Act, to concur in a grant made by himself as tenant for life.

I agree with the Master of the Rolls in thinking that this question should be answered in the negative.

There is no occasion for me to refer in detail to the facts of the case, as they have been sufficiently alluded to by the Lord Justice *James*, but it is necessary to bear in mind that, though the present case is one in which it is proposed to grant a site for a church in a populous district in *Lancashire*, the purposes for which sites may be granted under the Act are not confined to sites for churches, but include sites for chapels, meeting houses, and other places for divine worship, residences for ministers, and burial places; and the grantor may grant any number of such sites, provided the area of each does not exceed one acre. The localities in which there exists the greatest necessity for making grants under the Act are those in which land is of exceptionally high value. It is further to be noted that the Act provides for such grants being made by way of gift as well as by way of sale; and, if a tenant for life were at liberty to make such grants, unfettered by any restrictions, it would be in his power to give away property of considerable value, substantially belonging to the tenant in remainder, and in which he, the tenant for life, may, by reason of advanced years or rapidly declining health, have but very little real interest.

C. A. 1876

In re MARQUIS OF SALISBURY AND THE ECCLESIASTICAL COMMISSIONERS.

It is unnecessary to do more than allude to the particular influences to which a tenant for life, so circumstanced, may be subjected.

In this view of the case, it can be no matter of surprise that the Legislature, when conferring upon the tenant for life the power of making grants in fee simple, should deem it expedient to impose restrictions upon that which would otherwise have been left entirely to his discretion; and we accordingly find a provision in the Act that no grant for any of its purposes, made by any person seised or entitled for life only, shall be valid, unless the person next entitled for a beneficial interest in remainder in fee simple or fee tail, if legally competent, shall join in and be a party to the same; or, if such person be a minor, a married woman, or a lunatic, unless the guardian, husband, or committee of such persons respectively shall in like manner consent.

Judgment, Baggallay, J.A.

Now it appears to me that the Legislature, in imposing these restrictions, must be presumed to have intended that they should be substantial and real; but, as regards infant tenants in tail, they cannot be substantial and real if, as is contended, the father can not only make the grant as tenant for life, but can concur in and confirm it as guardian of his son.

It is matter of general knowledge that, in a very large proportion of the cases of tenant for life and infant tenant in tail or fee simple, expectant on the determination of such life estate, the former stands in the relation of father to the latter, and it could hardly have been the intention of the Legislature that the restrictions should be in substance unreal in so large a proportion of the cases in which it was thought fit nominally to impose them. And these *à priori* views are, I think, in accordance with a reasonable construction of the Act. It appears to me that the guardian, referred to in sect. 1, must be the guardian of the infant's estate, and not the guardian of his person only. The father, as such, is not the guardian of his infant child's estate, though he is usually selected for that office when any appointment is made by the Court, and he has no conflicting interest. And this view is supported by the provision in the Act that the committee must concur in the case of a lunatic remainderman, which, as it appears to me, must have reference to the committee of the lunatic's estate, and not to the committee of his person.

The fact of Lord *Cranborne* having attained the age of fourteen years renders it unnecessary to consider the incidents of guardianship in socage.

With respect to the question now under consideration, it appears to me not immaterial to consider the terms of the *Leases and Sales of Settled Estates Act*, 1856, and the practice under it, as regards consents on the part of the guardians of infants. By that Act it is provided that all applications and consents under it may be made or given by guardians on behalf of infants, and by committees on behalf of lunatics; but the Court has never recognised the father of an infant remainderman as a guardian of the infant within the meaning of the Act, but has always required that a guardian should be appointed by the Court. In an early case, *Re Caddick's Settled Estates* (1), it was held that the father could not be accepted as guardian of his infant child, even though *primâ facie* he had no adverse interest; and Vice-Chancellor *Kindersley*, in a case, *Re Nolleston*, not reported, but recognised and acted upon in the Registrars' offices, held that a testamentary guardian was not a guardian within the meaning of the Act (2). And here I would draw attention to the fact that the *Leases and Sales of Settled Estates Act*, 1856, does not any more than does the Act now under consideration contain any provisions for the appointment of guardians to make application or give consents under it; and further, that whilst provision is made by the latter portion of the 36th section of the former Act that no application or consent shall be made by any guardian or committee without the special direction of the Court, such direction is given in the case of a father, by appointing him to act as guardian for the purpose of making such application or giving such consent, and not by simply directing him as guardian to make or give the same.

On the whole, I am of opinion, though much regretting to differ from the other members of the Court, that the Marquis of *Salisbury* is not the guardian of his infant son, Lord *Cranborne*, within the intent and meaning of the *Places of Worship Sites Act*, 1873.

It has been suggested, in the course of the arguments in this case, that no provision is made by the Act now under consideration

(1) 7 W. R. 334. (2) And see *In re James*, Law Rep. 5 Eq. 334.

C. A. 1876

In re MARQUIS OF SALISBURY AND THE ECCLESIASTICAL COMMISSIONERS.

Judgment, Baggallay, J.A.

for the appointment of guardians, and the Master of the Rolls appears, from the printed report of his judgment, to have inclined to that opinion, though he was not called upon to decide, and did not decide the question, that the Court had no power to appoint a guardian to give the necessary consent.

Now, if such were the case, it would afford some slight additional force to the reasons urged in support of the view that the Legislature contemplated the case of the father acting as the guardian of his infant son in cases like the present, as the Act would otherwise be in so many cases inoperative; but the reasons so supplemented would not, in my opinion, be sufficient to outbalance those in favour of the opposite view to which I have already adverted, and I should be disposed to agree with the Master of the Rolls in thinking that it was a case not provided for by the Act.

In the view, however, which I take of the question, the Court has power to appoint a guardian to concur in a grant by a tenant for life under the Act, though I desire to be understood as not expressing a positive opinion upon the question, as it has only been incidentally raised, and has not been argued before us.

This view appears to me to be supported by the practice adopted in the Court of Chancery with reference to the concurrence of guardians in grants under the Act in question.

So far as I have been able to ascertain, the practice has been uniform in all branches of the Court, including the Court of the Master of the Rolls, previously to his order in this case, to appoint a guardian of an infant tenant in tail for the purpose of concurring in grants made under the Act, when the tenant for life has been the father of the infant remainderman; and this practice would not have been adopted had it not been considered, not only that the father, as such, was not a guardian of his child within the intent and meaning of the Act, but also that the Court had the power of appointing such a guardian.

As at present advised, I concur in this view; it appears to me reasonable, and would certainly be convenient in its results. I think, also, that it is consistent with the general principle that the Lord Chancellor has the power of appointing a guardian, not only for the protection of an infant, but for the protection of any

other person who is presumably unable to protect himself whenever the need for such protection arises.

The Court, in *Re Woolscombe* (1), appointed a guardian to consent to the marriage of an infant, such consent being rendered necessary by the marriage Act then in force; and it is to be noted that in that case the infant had no property, and that the guardian was not required by the Act then in force, as is the case under the subsequent Act, to be a guardian appointed by the Court of Chancery. The Act required the consent of a guardian, there was no guardian capable of giving such consent; the Act contained no provision for the appointment of a guardian, and the Court consequently interfered and supplied what was required.

Again, in the case of *Teynham* v. *Lennard* (2), the House of Lords, reversing the decision of Lord Chancellor *Macclesfield*, appointed a grandfather, tenant for life of certain estates, guardian of his infant grandson, who was tenant in tail in remainder of the same estates, and had no other property; and it appears from a note to *Ex parte Myerscough* (3), that the House of Lords confined itself entirely to the question of guardianship, and made no order as to maintenance, as had been assumed in previous comments upon it. It was with reference to this case that Lord *Hardwicke*, in *Ex parte Whitfield* (4), observed that the exercise of such a jurisdiction was not only conducive to the interests of infants, but operated as an inducement to persons of worth to accept the office of guardians, when assured of the protection of the Court, which they might have declined if left to act on their own responsibility and at their own risk.

I have thought it desirable to allude to these authorities, because, whilst I entirely concur in the view of the Master of the Rolls as to the question upon which alone, as it appears to me, he decided the case before him, I do not entertain the doubts expressed by him as to the power of the Court to appoint a guardian in a case like the present. The further point suggested by the Master of the Rolls, that it is the duty of the guardian to protect and not to give away the property of the infant, would appear to be one for the consideration of the Court on an application for the

(1) 1 Madd. 213.
(2) 4 Bro. P. C. 302 (Tom. Ed.)
(3) 1 Jac. & W. 152.
(4) 2 Atk. 316.

C. A. 1876

In re MARQUIS OF SALISBURY AND THE ECCLESIASTICAL COMMISSIONERS.

appointment of a guardian in a particular case, and not to affect the general question of the power to make such an appointment; for it may well be that, though the Court has such power, it will decline to exercise it unless satisfied that it is for the benefit of the infant, pecuniarily or otherwise, that it should do so.

Judgment, Blackburn, J.

BLACKBURN, J.:—

I agree with the judgment of Lord Justice *James*, both in the result to which he comes and the reasons he gives, for which I refer to his judgment without repeating them.

I will only add that the scheme of the Act 36 & 37 Vict. c. 50, seems to me to shew that the Legislature thought that sites for places of worship, not exceeding one acre, would generally be of inconsiderable value, and, therefore, have endeavoured to make the conveyances simple and cheap, and have not put the matter under the control of the Court of Chancery, which might perhaps afford protection to the property, but would certainly cause some trouble and some expense.

It is true that an acre of land, situated near the *Exchange* in *London*, for instance, may be of immense value; but the Legislature either overlooked this or thought it sufficient to trust to the tenant for life's regard to his own interest to prevent his granting such a very expensive site for a place of worship.

But it seems that the Legislature did think that the grant of a site or sites for places of worship scattered over an estate might be very annoying personally to the person entitled to the next estate of inheritance if, as may not improbably be the case, he was of a different religious persuasion from the tenant for life.

To provide against the risk of this annoyance, the assent of that person, if legally competent, is rendered necessary; but the Court of Chancery has no control over the remainderman, either to compel him to give the assent which he unreasonably refuses, or to prevent his assenting.

If he is not legally competent, the assent of the guardian of the infant person under disability is made necessary, but there is no provision here expressly referring the matter to the Court of Chancery. The husband of a married woman is the guardian of her person; he is not interested in the property, but it is thought

sufficient to protect a married woman, being the owner of the next estate of inheritance, from the risk of personal annoyance, to make the assent of the husband necessary. In the case of a lunatic, the assent of the committee is necessary. Whether this means the committee of his person, or the committee of his estate, or both, I do not know. In the case of such unfortunate persons, the whole matter is already in the hands of the Court in lunacy, and it may be that the sanction of the Court is requisite. I give no opinion on this. Nor do I give any opinion as to the cases in which the infant is already a ward in Chancery. But in general the necessity for obtaining the assent of the guardian, that is, the personal guardian, of an infant, would protect that infant from the risk of annoyance. It is true that where the guardian is, as in the present case, himself the tenant for life, the necessity for his assent gives no additional protection. Perhaps the Legislature thought that the instances in which an infant tenant in tail had religious views strongly opposed to those of his father and guardian were too rare to be worth providing for. And this is rendered more likely, as there is no provision for any protection to unborn tenants in tail, who will probably be educated in the persuasion of their father, but not more probably than young infants.

I see nothing in previous legislation adverse to this view.

In the *Settled Estates Act*, 1856, the whole question is one of property; there are careful provisions that all shall be done under the control of the Court of Chancery; and in sect. 36 there is a proviso that the guardians shall act only by order of the Court. These form excellent reasons for requiring nothing to be done till there has been a suit or other proceeding in Chancery. In the Act before us there are no such provisions. Either the father, tenant for life, must wait till his son attains full age, or he must apply to the Court of Chancery for the purpose of making his son a ward in Chancery, which is not always practicable. If the whole matter is to be brought to the mind of the Court, so that the Court may apply some principle (I own I do not see what), and according to its view give or refuse assent, it might perhaps afford some protection, but would certainly cause much trouble and expense, even when practicable. If, as is suggested, it would be sufficient to obtain, as a matter of course, an order appointing

C. A. 1876 *In re* MARQUIS OF SALISBURY AND THE ECCLESIASTICAL COMMISSIONERS. Judgment, Blackburn, J.

a clerk of the solicitor guardian *ad hoc* for the purpose, the trouble would be slight and the expense not great, but there would be no protection or benefit at all. And to bring about this inconvenient result we are asked to depart from the *primâ facie* meaning of the words, and say "guardian" here means, not the guardian, but the person appointed by the Court of Chancery to act as deputy for Her Majesty in protecting an infant, who is not in strictness a guardian at all; or else to say that there is an exception to be interpolated, that where the guardian is himself the tenant for life, he shall not act as such.

I think we ought not to do this, especially when the result is to do no good, and to frustrate the object of the Act by rendering the proceedings intended to be simple and cheap complicated and expensive.

Solicitors: *Nicholson & Herbert; White, Borrett, & Co.*

C. A. 1876 *Jan.* 29; *Feb.* 4.

COGAN *v.* DUFFIELD.

[1874 C. 20.]

Settlement in Pursuance of Articles—Limitations to Children.

7 Ch D. 11
13 Ch D. 658, 9
17 Ch D 780

Ante-nuptial articles were signed which provided for the wife's personal estate being vested in trustees, "the trusts of the income being for the benefit of the said [husband and wife] during their lives, and the trusts of the capital being for and amongst the children according to the appointment of the said [husband and wife], or the survivor of them; and in default of appointment, to the children equally; and in the event of there being no children, and of the said [husband] being the survivor, the trust property to be at his absolute disposal." After the marriage a settlement was executed which limited the income to the husband and wife during their joint lives, and to the survivor of them during his or her life, and then gave the capital to the children absolutely as tenants in common; but if there was no child, and the husband survived the wife, then to the husband. There was only one child of the marriage, and he died at the age of six months, in the lifetime of the parents. The husband died in the lifetime of the wife:—

Held (affirming the decision of *Bacon*, V.C.), that the capital of the fund and the arrears of income at the death of the husband belonged to the wife, for that the Court would have carried the articles into effect by giving the wife the first life estate to her separate use, and by making the shares of

sons contingent on their attaining twenty-one, and of daughters on their attaining twenty-one or marrying, or by inserting clauses of survivorship and accruer on the death of sons under twenty-one and of daughters under that age and unmarried, so that the husband would have had no title as next of kin of his deceased infant child, and that the settlement must be rectified accordingly.

C. A. 1876 COGAN v. DUFFIELD.

Statement.

THIS was an appeal by the Defendant, *Bernard Cogan*, from a decree of Vice-Chancellor *Bacon*.

Joseph Cogan, deceased, intermarried with Miss *Agnes Duffield* on the 16th of March, 1867. Before the marriage some difficulties arose as to the mode in which the lady's fortune, consisting of consols, should be settled, and ultimately articles were hastily drawn on the morning of the wedding-day, and signed immediately before the marriage. These articles provided for the transfer of the funds to the trustees, *Thomas Duffield* and *Bernard Cogan*, to whom powers of varying the investment were given, and the only provision as to the beneficial interests was as follows :—

"The trusts of the income thereof being for the benefit of the said *Agnes Duffield* and *Joseph Cogan* during their lives, and the trusts of the capital being for and amongst the children according to the appointment of the said *Joseph Cogan* and *Agnes Duffield*, or the survivor of them ; and in default of appointment, to the children equally ; and in the event of there being no children, and of the said *Joseph Cogan* being the survivor, the trust property to be at his absolute disposal."

After the marriage a settlement was executed by which, after reciting the articles, the fund was settled upon trust to pay the income to the husband and wife during their joint lives, and after the death of either, to the survivor for life, and after the death of the survivor, as to the capital, in trust for the children or child of the marriage as the husband and wife should jointly appoint, and in default of appointment, in trust for the child or children, and if more than one, as tenants in common. If there was no child, then the fund was to be in trust for *Joseph Cogan* if he survived his wife.

There was issue of the marriage one child only, who died when about six months old, in the lifetime of both parents.

Joseph Cogan died in 1873, leaving a will by which he gave

C. A. 1876 COGAN v. DUFFIELD. Statement.

all his real and personal estate to his brother, the above-named *Bernard Cogan*, whom he appointed his executor.

In January, 1874, Mrs. *Cogan* filed her bill against *Thomas Duffield* and *Bernard Cogan*, praying for a rectification of the settlement; for a declaration that the Plaintiff was entitled to the arrears due at Dr. *Cogan's* death of the rents of certain lands purchased with part of the trust funds, and was absolutely entitled to all the trust property; and that the Defendants might be ordered to convey and transfer the same to her.

Vice-Chancellor *Bacon* having made a decree as prayed (1), *Bernard Cogan* appealed.

Argument.

Kay, Q.C., and *Freeling*, for the Appellant:—

The intention of the parties must be their intention at the time, not what they would have intended had they foreseen the result of what they were doing: *Wilkinson* v. *Nelson* (2); *Barrow* v. *Barrow* (3). Where a settlement is prepared according to the intention of one of the parties, though under a mistake of the other party, it cannot be rectified: *Sells* v. *Sells* (4), *Earl of Bradford* v. *Earl of Romney* (5). There is no ground, therefore, for altering this settlement, unless there is a rule that "children" in marriage articles means only children who attain twenty-one or marry, and we say that the cases do not establish any such rule. Neither in *Taggart* v. *Taggart* (6) nor in *Young* v. *Macintosh* (7) does the judgment contain a word on the point, nor was it necessary in either of those cases to decide it. The question does not appear to have been brought to the attention of the Court.

[JAMES, L.J., referred to *Randall* v. *Willis* (8).]

G. W. Lawrance, for *Thomas Duffield*.

Davey, Q.C., and *Jason Smith*, for the Plaintiff:—

This is, in effect, a suit to carry the articles into execution. They are executory, and contemplate the making of a settlement.

(1) Law Rep. 20 Eq. 789, where a full statement of the facts will be found.
(2) 9 W. R. 393.
(3) 18 Beav. 529.
(4) 1 Dr. & Sm. 42.
(5) 30 Beav. 431, 438.
(6) 1 Sch. & Lef. 84.
(7) 13 Sim. 445.
(8) 5 Ves. 262.

As regards the destination of the rents, even if the articles create a joint tenancy, the wife is entitled to the arrears by survivorship: *Laprimaudaye* v. *Teissier* (1); *Re Mittam* (2). But the articles are a mere minute, and the Court, in carrying them into effect, would have given the wife the first life estate to her separate use. As regards the issue of the marriage, the articles govern the case: *Marquis of Blandford* v. *Duchess of Marlborough* (3); *Randall* v. *Willis* (4); and if the settlement does not correspond with the settlement which the Court would have ordered in a suit to have a settlement executed, it must be rectified now. *Taggart* v. *Taggart* (5), *Young* v. *Macintosh* (6), and *Blackburn* v. *Stables* (7) shew that the Court would not have made the settlement in such a form as to give an indefeasible interest to a child who died under twenty-one, and unmarried. *Spirett* v. *Willows* (8) indirectly helps us, by shewing how the Court deals with a fund under the wife's equity to a settlement. *Mayn* v. *Mayn* (9) recognises the form of settlement approved in the decree in *Taggart* v. *Taggart*.

[They were here stopped by the Court.]

Freeling, in reply:—

In *Taggart* v. *Taggart* the only question was whether the children took as joint tenants or tenants in common. *Young* v. *Macintosh* was under a will. There was no bargain, and the only thing to be looked to was the testator's intention. *Spirett* v. *Willows* was under equity to a settlement, where the object of the Court is that so long as the wife or any child is living no part of the fund shall go to the husband.

[JAMES, L.J.:—The object of the Court is to provide in the best way for the wife and children.]

Mayn v. *Mayn* is substantially the same as *Taggart* v. *Taggart*. The point did not call for decision.

JAMES, L.J.:— Judgment, James, L.J.

I am of opinion that there is no ground for disturbing the decree

(1) 12 Beav. 206.
(2) 4 Jur. (N.S.) 1077.
(3) 2 Atk. 542.
(4) 5 Ves. 262.
(5) 1 Sch. & Lef. 84, 89.
(6) 13 Sim. 445.
(7) 2 V. & B. 367, 370.
(8) Law Rep. 4 Ch. 407.
(9) Law Rep. 5 Eq. 150.

C. A. 1876 COGAN v. DUFFIELD. Judgment, James, L.J.

of the Vice-Chancellor. What we have to decide is, what, under the circumstances, are the rights of the wife under the marriage articles, and we have to construe the articles with reference to the only surrounding circumstances at which we are at liberty to look, namely, that they are articles entered into in contemplation of marriage. It has been said that articles are nothing but rough minutes, or heads of instructions for a settlement; that description is most applicable here, for these articles are very rough indeed, and leave out almost everything for which a marriage settlement ought to provide. The only provisions they contain as to the beneficial interests in the trust funds are these: "The trusts of the income thereof being for the benefit of the said *Agnes Duffield* and *Joseph Cogan* during their lives, and the trusts of the capital being for and amongst the children according to the appointment of the said *Joseph Cogan* and *Agnes Duffield* or the survivor of them, and in default of appointment, to the children equally; and in the event of there being no children and of the said *Joseph Cogan* being the survivor, the trust property to be at his absolute disposal." How ought these words to be construed? There are cases which shew that if an executory trust had been created by a will in terms like these, the Court would have carried it into execution in such a way as would most effectually secure the capital for the benefit of the children. Here the words are not contained in a will, but in marriage articles, which makes the case all the stronger, for marriage articles ought as far as possible to be construed so as to make the most effectual provision for the children of the marriage. This would be effected by inserting in the settlement a gift to such of the children as being sons should attain twenty-one, or being daughters attain that age or marry, or by giving the fund among the children with a proviso giving over to the others of them the share both original and accruing of each child who being a son should die under twenty-one, or being a daughter die under that age unmarried. In *Taggart* v. *Taggart* (1) a most eminent Judge held that the fund ought to be limited to the children as tenants in common, with provisions for limiting over the shares of any who died under twenty-one, and without issue. The Vice-Chancellor of *England*, in *Young* v. *Macintosh* (2),

(1) 1 Sch. & Lef. 84. (2) 13 Sim. 445.

acted on the same principle by settling the fund so as to give vested interests to those children only who being sons attained twenty-one, or being daughters attained that age or married. If it were necessary to choose between these two schemes of settlement, I should be rather in favour of that of the Vice-Chancellor of *England*, who was a great authority on matters of conveyancing; but in the present case it is unnecessary to decide the point, for in neither way could a child who died under twenty-one and unmarried become absolutely entitled to any part of the capital. The husband, therefore, could not acquire a title as representing his deceased child, and as he did not survive his wife, there is no other way in which a title through him can be made out. I am of opinion, therefore, that on this point the decree is right.

Then, as to the arrears of income due at the death of the husband, it clearly was never intended that the husband and wife should be tenants by entireties of the income. The expression in the articles is vague, and if the Court had been called upon to decree the execution of a settlement, it would have given the first life estate to the wife for her separate use. The decree, therefore, is, in my opinion, right in this respect also.

MELLISH, L.J., concurred.

BAGGALLAY, J.A.:— Baggallay, J.A.

I am of the same opinion. It is established by the cases that, where a post-nuptial settlement purports to be made in pursuance of ante-nuptial articles, though the limitations of the settlement may agree with the words of the articles, still, if it does not carry out their intent, the Court will reform it. There are three main points to be looked to in a settlement—the destination of the income, the mode in which the capital is to be limited to the children, and the way in which it is to go if there are no children who acquire an indefeasible interest in it. The mode of settling a wife's fortune which is approved by the Court is to give her the first life interest for her separate use, then a life interest to the husband, then (subject to powers given to the husband and wife of appointing the fund) among the issue of the marriage, it is given equally to such of the children as being sons attain

BIBL. LONDIN UNIV.

C. A. 1876 COGAN v. DUFFIELD. Judgment, Baggallay, J.A.

twenty-one, or being daughters attain that age or marry, or else to the children equally, with gifts over in favour of the others if any of them being sons die under twenty-one, or being daughters die under that age and unmarried; if there is no child who being a son attains twenty one, or being a daughter attains twenty-one or marries, then if the wife survives the fund is limited to her, but if she dies in her husband's lifetime she has a general power of appointment over it, and in default of any exercise of that power it is given to her next of kin as if she had died intestate and without having married.

Such being the form of settlement which the Court considers most expedient, what would it do as to these articles? So far as they expressly provide for the destination of the income or capital, the Court must yield to them. But, in construing them, it will have regard to what is recognised as the most proper form of settlement. Now here, as regards the income, the articles are mere heads and do not make a complete disposition of the income during the lives of the husband and wife. It is necessary to supplement them, and I agree that they ought to be carried into effect by giving the wife the first life estate to her separate use, and that she is therefore entitled to the arrears of income.

When we come to the provisions for the children we find only general words, which must be supplemented. I cannot entertain any doubt as to what the Court would have done if this had been a suit to have a settlement executed in pursuance of the articles, instead of a suit to rectify the settlement when made. The settlement would either have made the interests of the children contingent on their attaining twenty-one, being sons, or being daughters, attaining that age or marrying; or it would have contained limitations over of the shares of sons dying under twenty-one, and of daughters dying under that age and unmarried. The husband then could not take as representative of a child who died an infant and unmarried; and the articles furnish no pretence for saying that there was any direct gift to him in the event of his wife surviving him. I agree, therefore, that the decree is in all respects right.

Solicitors: *R. S. Taylor & Son; Vizard, Crowder, & Anstie.*

Ex parte SMITH. *In re* COLLIE.

C. A. 1876 Feb. 11.

Rules of Court, 1875, *Order* XVI., *r.* 18—*Bankruptcy Act*, 1869, *s.* 72—*Jurisdiction—Injunction—Right over against Person not Party to Action.*

C. bought goods on credit from *H.* After delivery, but before the time for payment, *C.* became bankrupt. *H.*, when the time for payment arrived, commenced an action against *S.* for the price, alleging that *C.* had bought the goods by the authority of *S.*, and either on account of *S.* or on the joint account of *S.* and *C.* *S.* thereupon served the trustee with a notice under Order XVI., rule 18, of the Rules of Court, 1875. The trustee then applied for and obtained in bankruptcy an order restraining *S.* from taking or continuing any proceedings against the trustee under Order XVI.:—

Held, on appeal, that this order must be discharged, for that the case between *H.* and *S.* could not be tried in bankruptcy, and that *S.*, if found liable in the action, ought not to have to try the same question again in bankruptcy between himself and the trustee.

Statement.

THIS was an appeal by Messrs. *Smith, Wood, & Co.* from an order of Mr. Registrar *Murray*, sitting as Chief Judge.

In May and June, 1875, *Collie & Co.* ordered two parcels of goods from *Robert Hopwood & Son.* These goods were delivered as to one parcel on the 28th of May, and as to the other on the 4th of June. Before the time for payment had arrived *Collie & Co.* were adjudicated bankrupts, and the goods came into the possession of their trustee.

On the 5th of November, 1875, *Hopwood & Son* commenced an action against *Smith, Wood, & Co.* for the price of the goods. The statement of claim alleged that the Plaintiffs supposed, at the time of the purchase, that *Collie & Co.*, who purchased in their own names, were the principals in the transaction, but that they had, since *Collie & Co.* stopped payment, discovered that *Collie & Co.* were authorized by the Defendants to order, and did order, the said goods, either on the joint account of themselves and the Defendants, or on account of the Defendants as undisclosed principals.

On the 3rd of December *Smith, Wood, & Co.* served the trustee in bankruptcy with the statement of claim, and with the following notice:—

"Take notice, that this action has been brought against the

C. A. 1876 — *Ex parte* SMITH. *In re* COLLIE.

Statement.

Defendants to recover damages for breach of contract for the sale and delivery to the Defendants of certain goods and for £212 10*s.* alleged to be due by the Defendants in respect of the said goods.

"The Defendants claim to be indemnified by you as trustee aforesaid against all liability in respect of the said contract, or any breach thereof, and in respect of the said sum of £212 10*s.*, on the ground that the said contract was entered into by the said Messrs. *Collie & Co.*, and not by the Defendants, as by the Plaintiffs alleged; and also that you, as trustee, have the said goods sued for, or their proceeds or their value.

"And take notice, that if you wish to dispute the Plaintiffs' claim in this action as against the Defendants, Messrs. *Smith, Wood, & Co.*, you must cause an appearance to be entered for you within eight days after service of this notice.

"In default of your so appearing, you will not be entitled in any future proceedings between the Defendants, Messrs. *Smith, Wood, & Co.*, and yourself to dispute the validity of the judgment in this action or the amount payable thereunder, whether obtained by consent or otherwise."

On the 11th of December the trustee entered an appearance in the action, but, on the 15th, gave notice of motion in bankruptcy to restrain *Smith, Wood, & Co.* from taking or continuing any further proceedings commenced by them against the trustee under Order XVI. of the *Judicature Act* in the above action; and on the 23rd of December Mr. Registrar *Murray* made an order accordingly.

Argument.

Marten, Q.C., and *T. F. Thompson*, for the Appellant:—

This is the precise case contemplated by Order XVI., rule 18, of the Rules of Court, 1875; and rule 21 enables the Court to direct such proceedings as may be necessary if the party served wishes to intervene. If *Smith, Wood, & Co.* are held liable in the action, they ought to have some remedy over; and when they come to seek it, they ought not to be liable to be met by the allegation that they might have successfully defended the action. *Treleven* v. *Bray* (1) is an instance of the application of rule 18. The Court

(1) 1 Ch. D. 176.

C A. 1876
Ex parte SMITH.
In re COLLIE.

of Bankruptcy only grants injunctions on the ground that the matter in dispute ought to be tried in bankruptcy: *In re Motion* (1); *Ex parte Gordon* (2); *Ex parte Coker* (3). This is a matter which cannot be tried in bankruptcy.

Argument.

De Gex, Q.C., and *Linklater*, *contrà*:—

It would be very inconvenient, in the administration of bankrupts' estates, to have the trustees dragged in as parties to actions between other parties. The Court of Bankruptcy is the proper forum for deciding the matter: *Ex parte Cohen* (4).

[MELLISH, L.J.:—What jurisdiction has the Court of Bankruptcy to try whether *Smith, Wood, & Co.* are liable to *Hopwood & Son?*]

Judgment, James, L.J.

JAMES, L.J.:—

This appears to me to be precisely the case intended to be provided for by Order XVI., rule 18. The action is brought against the Defendants in respect of goods for which it is said that they are liable. They say that, if so, they have a remedy over. They do not wish to be obliged to try the question twice over: to have to pay in the action, and then come to the Court of Bankruptcy and have the question raised again whether they were liable to pay.

Mellish, L.J.

MELLISH, L.J.:—

I am of the same opinion. The action is brought on the ground that the goods were bought by *Collie* by the authority of *Smith, Wood, & Co.*, either for them or on the joint account of *Smith, Wood, & Co.* and himself. If *Smith, Wood, & Co.* are found liable, then they claim a remedy over against *Collie's* estate. The trustee, therefore, is interested in the question whether the goods were bought on the account of *Smith, Wood, & Co.*, or on the joint account, or by *Collie* on his own account. It is said that an injunction ought to be granted that the case may be tried in the Court of Bankruptcy. But, as between *Hopwood & Son* and *Smith,*

(1) Law Rep. 9 Ch. 192.
(2) Ibid. 8 Ch. 555.
(3) Law Rep. 10 Ch. 652.
(4) Ibid. 7 Ch. 20.

C. A. 1876 *Ex parte* SMITH. *In re* COLLIE.

Wood, & Co., the case cannot be tried in bankruptcy; so, if an injunction were granted, the result would be that the question would have to be tried twice: first between *Hopwoods* and *Smith, Wood, & Co.*, and then between *Smith, Wood, & Co.* and the trustee; and there would be a risk of its being decided in different ways in the two proceedings, which would produce great injustice.

MELLOR, J.:—

I am of the same opinion.

Solicitors: *Travers Smith & Co.; Gregory, Rowcliffes, & Rawle.*

C. A. 1876 *Feb.* 18.

Ex parte HUXTABLE. *In re* CONIBEER.

Voluntary Settlement—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 91.

A person made a voluntary settlement of an estate which was subject to a mortgage, and covenanted with the trustees of the settlement that he would pay the interest on the mortgage, and when required, would pay off the principal. His assets, exclusive of the mortgaged estate, were sufficient to pay his debts other than the mortgage debt, but not sufficient to pay both. He afterwards became bankrupt:—

Held (reversing the decision of the Chief Judge), that the settlement was void as against the trustee in bankruptcy, under the *Bankruptcy Act*, 1869, s. 91.

Statement.

THIS was an appeal by the trustee in bankruptcy from a decision of the Chief Judge, who had reversed a decision of the County Court Judge at *Barnstaple* setting aside a settlement.

On the 26th of October, 1870, a piece of ground with a small unfinished inn which *William Conibeer* was then building upon it was conveyed to him in fee. By a deed dated the 27th of October, 1870, *Conibeer* mortgaged the property in fee for £450. By a deed dated the 28th of October, 1870, expressed to be made in consideration of his natural love and affection for his wife and his two daughters, he conveyed the property to *Knight* and *Kingdon*, to the use of his wife for life for her sole and separate use, with remainder to the use of himself for life, with remainder over in favour of his daughters and their children. By this deed *Conibeer*

covenanted with *Knight* and *Kingdon* that he would punctually pay the interest on the £450, and that when required by them so to do he would pay off the mortgage debt and the interest thereof; and he directed the mortgagee to reconvey the property to *Knight* and *Kingdon*, and their heirs, to the uses of the settlement. And it was declared that if the property should be sold by the mortgagee the surplus of the purchase-money should be paid to *Knight* and *Kingdon*, to be invested and held upon trusts corresponding with the uses of the settlement. At the time when this settlement was made *Conibeer* had other assets to the amount of £670 7*s*. His debts, exclusive of the mortgage debt, amounted to £317 7*s*. 5*d*. Among these were debts to the amount of £146, which still remained due at the time of his bankruptcy, including a debt of £86 to the petitioning creditor. After the settlement he expended £400 in completing the inn.

Statement.

On the 30th of March, 1875, *Conibeer* was adjudicated bankrupt. On the 8th of May the trustee gave notice of an application to set aside the settlement, as not protected by the 91st section of the *Bankruptcy Act*, 1869. This notice was afterwards amended by asking that the settlement might be declared void both under the *Bankruptcy Act*, 1869, and under the statutes 13 Eliz. c. 5, and 27 Eliz. c. 4. From the statement of the bankrupt's affairs, it appeared that his liabilities were £522, and that there were no assets, unless the equity of redemption in the settled property could be treated as such.

The County Court Judge set aside the settlement, and this decision having been reversed by the Chief Judge, the trustee appealed.

Winslow, Q.C., and *E. C. Willis*, for the Appellant:—

Argument.

This settlement is bad under the *Bankruptcy Act*, 1869, s. 91, on the ground that the settlor was not at the time able to pay all his debts without the aid of the property comprised in the settlement. His other assets were £670 7*s*.; his debts, beside the mortgage debt, were £317, and the mortgage debt must be added to them because he had covenanted to pay it off.

De Gex, Q.C., and *Pocock*, *contrà*:—

The settlor had abundant assets to pay his debts other than the

C. A. 1876

Ex parte HUXTABLE. *In re* CONIBEER.

mortgage debt, and the mortgage debt was amply secured. As regards his covenant to pay the mortgage debt, that is only a voluntary covenant, and the covenantee could not prove in competition with the other creditors, so that such an obligation is not within the reason of the enactment. Moreover, a debt created by the deed itself could hardly in any case be within the enactment; the question under which is, was the party, apart from the settled property, solvent when he made the settlement?

Judgment, James, L.J.

JAMES, L.J.:—

At the time when the settlement was made the debtor owed debts which, together with the mortgage debt, exceeded the amount of his assets other than the mortgaged property. He made a settlement, which for this purpose must be taken to have been, not a settlement of the equity of redemption, but of the whole estate; for he covenanted with the trustees to pay off the mortgage debt out of his other assets. If he had paid the debt according to this covenant, enough would not have been left to pay his other creditors. Whether the deed is bad under 13 Eliz. c. 5, or not, it is bad under sect. 91 of the *Bankruptcy Act.*

Mellish, L.J.

MELLISH, L.J.:—

The question is, whether this settlement is to be treated as a settlement of the equity of redemption or of the whole property. Generally, you cannot consider a man to be settling more than he has got, and generally, you exclude a fully secured debt from his debts. But here the deed recites an intention to settle the whole property, and the settlor covenants to pay the interest on the mortgage debt, and, on demand, to pay off the principal. If, therefore, the trustees had demanded payment, it must have been made out of his other assets, leaving them insufficient for payment of his other debts. I am therefore of opinion that under the 91st section of the *Bankruptcy Act* the settlement is void as against the trustee in bankruptcy.

BAGGALLAY, J.A.:—

I am of the same opinion.

Solicitors: *G. J. P. Caines; Clarke, Woodcock, & Ryland.*

Ex parte BROOKER. *In re* FASTNEDGE.

C. A. 1876 Feb. 18.

Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 30; *s.* 125, *sub-ss.* 7, 9—*Moneys kept in the Hands of Trustee.*

Held (affirming the decision of the Registrar), that sect. 30 of the *Bankruptcy Act*, 1869, charging a trustee with interest at £20 per cent. per annum upon the excess above £50 of any moneys retained in his hands for more than ten days, does not apply to a trustee under a liquidation.

Statement.

THIS was an appeal by some of the creditors of a debtor whose affairs were in liquidation from a decision of Mr. Registrar *Spring Rice*, sitting as Chief Judge, refusing an application that Mr. *Kemp*, the trustee of the estate, might be ordered to file an account, verified by affidavit, of his receipts and payments as trustee, with the dates of such receipts and payments, and that such account might be referred to the Registrar to ascertain what sums exceeding £50 the trustee had from time to time retained in his hands for more than ten days, and that the trustee might be ordered to pay into the *Bank of England* the amount of all moneys in his hands beyond the sum of £50, and might be charged with interest at the rate of £20 per cent. per annum on all sums in excess of £50 which he had retained in his hands for more than ten days.

On the 26th of March, 1873, *Fastnedge & Co.* filed a petition for liquidation of their affairs by arrangement or composition. At an adjourned first meeting of creditors, held on the 29th of May, 1873, it was resolved by a statutory majority that the affairs of the debtors should be liquidated by arrangement. Mr. *Kemp*, a member of an eminent firm of accountants, was appointed trustee, and a committee of inspection was appointed.

The creditors did not appoint any bank into which the trustee should pay the moneys received by him. He paid the moneys into the general account of his firm, with *Barclay & Co.* This he deposed was known all along to the committee of inspection, and this statement was supported by one of the members of the committee, who also stated that on one occasion a proposal was made that the money should be placed on deposit, but was not agreed to, as the amount was considered too small. On the 11th of May,

C. A. 1876

Ex parte BROOKER. *In re* FASTNEDGE.

Statement.

1875, the bulk of the assets having been collected, the committee passed the accounts of the trustee, and a dividend of 2*s.* in the pound was declared.

Mr. *Kemp* deposed that where an estate was large it was always kept to a separate account, but that in the case of a small estate it was often for convenience dealt with in the same way as in the present case. He also deposed, and this was not contradicted, that the *Bank of England* declines to open an account in cases of liquidation.

Several of the creditors, after the accounts had been passed, made the application against Mr. *Kemp* which is set out above, and the application having been refused by the Registrar, the present appeal was brought.

Argument.

E. C. Willis, for the Appellant:—

The *Bankruptcy Act,* 1869, s. 30, is express and imperative. The language varies from that of the corresponding section in the old *Bankruptcy Act* (6 Geo. 4, c. 16, s. 104), which only said that the assignees should be "liable to be charged," whereas here it is enacted that the trustee "shall be charged."

[BAGGALLAY, J.A.:—Taking the whole of the present section together, does it not mean that he shall be liable to be charged if the Court thinks it a proper case?

MELLISH, L.J.:—Has the trustee kept the money in his hands? He put it to the account of his firm.]

If he has not kept it in his hands he has done worse, by making it impossible to treat the money as earmarked.

Benjamin, Q.C., and *Finlay Knight,* for Mr. *Kemp*:—

Under Rule 109 of the *Bankruptcy Rules,* 1870, the trustee was justified in the course he took. Moreover, this is not a case of bankruptcy, but of liquidation, and under sect. 125, sub-sects. 7 and 9, the provisions of sect. 30 are not incorporated and do not apply to a liquidation. The Court, therefore, has no jurisdiction to impose this penalty for a course of proceeding which has not occasioned any loss to the estate.

[They were then stopped by the Court.]

C A.
1876
Ex parte BROOKER.
In re FASTNEDGE.

Willis, in reply:—

According to *Ex parte Old* (1), sect. 30 does apply in cases of liquidation, and Rule 109 cannot have been intended to repeal it.

JAMES, L.J.:—

Judgment, James, L.J.

Now that the Act has been well considered, I am of opinion that sect. 30 does not apply to cases of liquidation. The Act prescribes certain things as to a trustee in bankruptcy, and many things applicable to a trustee in bankruptcy are just as applicable to a trustee in liquidation. Then sect. 125, sub-sect. 7, provides that "the trustee under a liquidation shall have the same powers and perform the same duties as a trustee under a bankruptcy," but does not go on to say that he shall be subject to the same penalties. It then proceeds to say that, "with the modification hereinafter mentioned, all the provisions of this Act shall, so far as the same are applicable, apply to the case of a liquidation by arrangement, in the same manner as if the word 'bankrupt' included a debtor whose affairs are under liquidation, and the word 'bankruptcy' included liquidation by arrangement." Then follows sub-sect. 8: "The creditors, at their first or any general meeting, may prescribe the bank into which the trustee is to pay any moneys received by him, and the sum which he may retain in his hands." This is a re-enactment as regards liquidation of part of the provisions contained in sect. 30 as to bankruptcy, but it does not go on like that section to provide that if the creditors do not prescribe a bank, he is to pay the moneys into the *Bank of England*, nor does it prescribe any penalty for his retaining them in his hands. This sub-section is evidently a substitute for sect. 30. Then follows sub-sect. 9, which is important as shewing that the scheme of the section was to give power to creditors, and put them into the place which in bankruptcy proceedings is occupied by the Court. It appears to me, then, that sect. 30 does not apply, and that the £20 per cent. interest cannot be granted. There is nothing in this construction to affect the ordinary liability of a trustee for breaches of trust. If he has committed a breach of trust, the Court can make him answerable for any loss

(1) Law Rep. 17 Eq. 457.

C. A. 1876 *Ex parte* BROOKER. *In re* FASTNEDGE.

which it has occasioned to the estate, and can call upon him to account for any profit which he has made by it; but that is not the nature of the present application, and for the present purpose it is enough to say that sect. 30 is not applicable.

Judgment, Mellish, L.J.

MELLISH, L.J.:—

I am of the same opinion. The section under which this application is made is a highly penal section, making a trustee liable to interest at £20 per cent. on moneys retained in his hands; whereas the Court only charges a trustee with the profit he has actually made, or in the alternative, at the utmost with £5 per cent. interest, with rests. A penal section like this cannot be transferred from bankruptcy to liquidation without clear words. The *Bank of England* is bound to receive bankruptcy accounts, but is not bound to receive liquidation accounts. In bankruptcy a limit of £50 is fixed as the amount which the trustee may retain in his hands, but no such limit is fixed as to liquidation. These circumstances shew a difference of intention as regards the cases of bankruptcy and liquidation. The 7th sub-section does not in terms make a trustee in liquidation liable to the same penalties as a trustee in bankruptcy; and as we should have to modify its terms to give it that effect, I think we ought to hold that a trustee in liquidation is subject only to the ordinary liabilities of a trustee.

Baggallay, J.A.

BAGGALLAY, J.A.:—

I am of the same opinion. The application is made under sect. 30, but I do not think that that section is applicable to cases of liquidation. In sect. 125 the intention of the Legislature appears to me to have been to make a difference between bankruptcy and liquidation, and in no respect more than as to the deposit of moneys. The matters were intended in liquidation to be left more under the control of the creditors than in bankruptcy.

Solicitors: *Combe & Wainwright; H. Wickens.*

In re PARES.

C. A.
1876
Feb. 19.

Lunatic Tenant in Tail—Mortgage to raise prior Charge—Form of Mortgage Deed—Right of Remainderman—Mortgage for Term of Years—Fines and Recoveries Act (3 & 4 *Will.* 4, *c.* 74), *s.* 21—*Lunacy Regulation Act*, 1853 (16 & 17 *Vict. c.* 70), *s.* 116.

A lunatic was tenant in tail of an estate, subject to a charge for portions. In a suit in the Court of Chancery a decree had been made ordering the charge to be raised by a sale or mortgage of the estate. On a petition by the committee, asking that he might execute a disentailing deed on behalf of the lunatic for the purpose of raising the charge by a mortgage :—

Held, that the interest of the remainderman ought not to be barred further than was necessary, and that the mortgage should be made for a term of years, and without a power of sale.

5 Ch D 882
12 Ch D 334

Statement.

THIS was a petition by the committee of *Mary Tylston Pares* (a lunatic), asking for the authority of the Court to execute a disentailing deed of certain real estate of which she was tenant in tail, and to concur with other persons in executing a mortgage of the estate.

Mary Tylston Pares was tenant in tail in possession (subject to a jointure rent-charge of £500, and to a charge of £5000 for portions) of three undivided fourth parts of an estate in *Leicestershire*, called the *Narborough* estate. On the 16th of May, 1874, a suit of *Macdonald* v. *Pares* was instituted in the Court of Chancery for the purpose of raising the £5000 by sale or mortgage of the estate. *Mary Tylston Pares* was one of the Defendants.

On the 21st of April, 1875, a decree was made by the Master of the Rolls, which ordered that the £5000, with interest and costs, should be raised by a sale or mortgage of the estate.

On the 2nd of July, 1875, *Mary Tylston Pares* was found a lunatic by inquisition. It was afterwards proposed, with the sanction of the Chief Clerk of the Master of the Rolls, to raise the sum raisable under the decree by a mortgage of the estate ; and a draft of the proposed mortgage was submitted to and approved by one of the conveyancing counsel of the Court.

The petition prayed that the committee might, in the name and on the behalf of the lunatic, by deed to be inrolled under the

C. A. 1876 *In re* PARES.

Fines and Recoveries Act, so as to bar her estate tail and the remainders subsequent thereto in the three-fourths of the estate, concur with the persons interested in the other one-fourth in executing the proposed mortgage of the estate, and that the Petitioner might out of the lunatic's estate keep down the interest on three-fourths of the mortgage money.

Argument.

W. Pearson, Q.C., and *J. Mander*, for the Petitioner.

Fischer, Q.C., and *Upton*, for the co-heiresses and next of kin of the lunatic.

Fry, Q.C., and *Cozens-Hardy*, for the remainderman expectant on the lunatic's estate tail, submitted that the entail ought not to be absolutely barred, and that the equity of redemption should be limited to the existing uses. The power of sale, too, ought not to be exercised without notice to the remainderman, or there should be no power of sale inserted.

W. Pearson, Q.C., suggested that the mortgage might be made for a term of years. Under sect. 21 of the *Fines and Recoveries Act*, this would leave the remainders subsisting; and the Court had power, under sect. 116 of the *Lunacy Regulation Act*, to make the order in this form.

Judgment, James, L.J.

JAMES, L.J., said that it could not be assumed that the lunatic, if sane, would have desired to bar the entail, and it ought not to be barred further than was necessary for the purpose. The order would be that the mortgage be made for a term of years, and without any power of sale, and the equity of redemption would be reserved to the persons entitled under the settlement. The deed to be settled by the Master, and the costs of the Petitioner and Respondents (other than the remainderman) to be paid out of the lunatic's estate.

MELLISH, L.J., concurred.

April 8. The case was mentioned again to the Court with regard to the form of the mortgage deed.

THE COURT said that the deed must express that the estate tail of the lunatic and the remainders over were barred "for the purpose of giving effect to this security, but not further or otherwise." C. A. 1876 *In re* PARES.

Solicitors: *C. J. Mander; Hunter, Gwatkin, & Co.; Field, Roscoe, & Co.*

Ex parte WATSON. *In re* WATSON.

C. A. 1876 *March* 2.

Composition—Failure to pay—Action by Creditor—Injunction—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 126—*Bankruptcy Rules*, 1870, *rr.* 260, 279.

The creditors of debtors who had filed a liquidation petition resolved to accept a composition, and appointed a trustee to receive and distribute it. In the debtor's statement it was mentioned that two persons claimed to be creditors for a large sum, but that their claim was the subject of an action, which had been referred to an arbitrator, the reference being still pending. These persons attended the meetings of the creditors (of which notice had been sent to them), and tendered a proof, but their proof was objected to, and they were not allowed to vote. Several months afterwards the arbitrator made his award, finding a large sum due to them. The composition not having been paid or tendered to them, they commenced an action against the debtors for the amount of the award:—

Held, that the action ought not to be restrained.

Ex parte Paper Staining Company (1) followed.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, sitting as Chief Judge in Bankruptcy. Statement.

In November, 1872, an action was commenced in the Court of Common Pleas by Messrs. *Melhado & Lloyd* against Messrs. *Watson & Smith*, to recover the sum of £88,373 12*s.*, which the Plaintiffs claimed to be due to them from the Defendants. On the 11th of March, 1873, an order was made by Mr. Baron *Bramwell* referring the cause and all matters in difference between the parties to the arbitration of Mr. *J. H. Lloyd*. In January, 1875 (no award having been then made by the arbitrator), *Watson & Smith* filed a liquidation petition. The debtors' statement of affairs shewed that their unsecured debts amounted to £22,905, and that their assets amounted to £9540. *Melhado & Lloyd* were not inserted

(1) Law Rep. 8 Ch. 595.

C. A. 1876 *Ex parte* WATSON. *In re* WATSON. Statement.

in the ordinary way in the list of creditors, but there was a separate entry as to them, stating that they claimed to be creditors for £94,000, with this note added:—"Acting under legal advice this claim was resisted, and became the subject of an action, and reference to *J. H. Lloyd*, Esq., which reference is now pending."

The first meeting of the creditors was held on the 24th of February, 1875. *Melhado & Lloyd*, to whom notice of the meeting had been sent, attended, and tendered a proof for £88,373 12*s*. This proof was objected to, and various grounds of objection were indorsed on it by the debtors' solicitor. Three of the objections were these:—"That the alleged claim is disputed by the debtors as not owing. That the claim is in the nature of unliquidated damages. That during the last two years the claim has been referred to arbitration, and that the creditors have in vain applied to the arbitrator to make an interim award." *Melhado & Lloyd* were not allowed to vote at the meeting, though they claimed to be entitled to do so. The following resolutions were passed:—That a composition of 5*s*. in the pound should be accepted in satisfaction of the debts due to the creditors from *Watson & Smith*; that the composition should be payable in four instalments, viz., 1*s*. in the pound at three months, 1*s*. in the pound at six months, 1*s*. in the pound at nine months, and 2*s*. in the pound at twelve months from the date of registration of the resolutions; and that *Thomas Kiss*, *John Beattie*, and *A. J. Atkey* should be appointed trustees in the matter to receive and distribute the composition. Creditors whose proofs amounted to £12,338 3*s*. 3*d*. assented to these resolutions. There were no dissentients except *Melhado & Lloyd*, who were not allowed to vote. At the second meeting of the creditors, on the 8th of March, 1875, the resolutions were confirmed. *Melhado & Lloyd* again attended, but were not allowed to vote. The resolutions were registered on the 24th of March, 1875. On the 26th of July, 1875, the arbitrator made his award, by which he found that £5075 was due from the Defendants to the Plaintiffs, and ordered the Defendants to pay that sum, and also to pay half the Plaintiff's costs of the reference, and the costs of the award. On the 19th of November, 1875, the order referring the matters in dispute in the action to arbitration was made a rule of Court. On the 21st of January, 1876, *Melhado & Lloyd*

commenced an action in the Common Pleas Division against *Watson & Smith*, to recover £5351 17*s.* 6*d.* This sum was made up of the £5075 found due by the award, £174 14*s.* 8*d.*, the taxed costs of the award, £73 12*s.* 4*d.*, half the taxed costs of the Plaintiffs of the reference, and £28 10*s.* 6*d.*, the taxed costs of the former action. The composition had not been paid or tendered to *Melhado & Lloyd*. It appeared that the trustees had received notices of some assignments having been made by *Melhado & Lloyd* of the debt due to them by *Watson & Smith*. On the 1st of February, 1876, *Watson & Smith* applied to the Court of Bankruptcy for an order to restrain *Melhado & Lloyd* from further proceeding with the action, so far as it related to the £5075 claimed to be due under the award. The Registrar refused the application. *Watson & Smith* appealed.

Statement.

Winslow, Q.C., and *Anstie*, for the Appellants:—

Argument.

The action should be restrained. The creditors were not entitled to vote at the meetings, because their claim was not then liquidated: *Ex parte Ruffle* (1).

[MELLISH, L.J.:—If this Court restrains the action, and then finds that the creditors are not bound by the composition, it has no jurisdiction to make an order for payment of the full amount of the debt. The whole matter cannot therefore be disposed of in this Court.]

That would be so in every case in which an action is restrained.

[MELLISH, L.J.:—It has been laid down in previous cases that, where the objection to the composition is one which applies only as between the debtor and the particular creditor who is bringing the action, the action ought not to be restrained.]

When a trustee is appointed under rule 279 to receive and distribute the composition, the debtor is not bound to tender it to the creditors: *Ex parte Waterer* (2). Here the creditors have submitted to the jurisdiction of the Court by tendering their proof, and the trustee is entitled to an inquiry to ascertain what is really due: *Ex parte Botting* (3). The question ought to be tried in the Court of Bankruptcy; if the creditors are bound by the compo-

(1) Law Rep. 8 Ch. 997. (2) 22 W. R. 426. (3) Law Rep. 19 Eq. 261.

C. A. 1876

Ex parte WATSON. *In re* WATSON.

Argument.

sition, they will have an order for payment of the amount of it; if they are not bound, then judgment for the whole debt would at once be given in the action. This would be the best and the quickest way of determining the question. *Ex parte King* (1) shews that an action will be restrained on equitable grounds. *Ex parte Paper Staining Company* (2) does not apply. The objection which the creditors really wish to raise is that the resolutions were not passed by the proper majority. That is an objection which, if it can be raised, goes to the validity of the resolutions generally, and ought to be tried in the Court of Bankruptcy. *Ex parte Baum* (3) is a case like the present. It shews that an action will be restrained even where the question is not one which affects the interests of the general body of creditors. The rule is not so strict as it would appear to be from what was said in *Ex parte Paper Staining Company.*

[MELLISH, L.J. :—In *Ex parte Baum* the action had been commenced before the filing of the liquidation petition. The injunction was granted under the provisions of rule 260. The right to grant it accrued as soon as the petition was filed.]

But the jurisdiction to grant an injunction must be exercised on the same principle in the one case as in the other.

Marten, Q.C., and *Horace Browne*, for the creditors, were not called on.

Judgment, James, L.J.

JAMES, L.J. :—

I am unable to see any distinction between this case and *Ex parte Paper Staining Company.* Every material question between the parties is raised in the action, and I can see nothing to induce us to withdraw the case from the jurisdiction of the Common Pleas Division. If I were to say anything as to the merits of the case it might prejudice the one side or the other.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitor for Appellant: *J. B. Batten.*
Solicitor for Respondent: *A. Pulbrook.*

(1) Law Rep. 17 Eq. 332. (2) Law Rep. 8 Ch. 595.
(3) Law Rep. 9 Ch. 673.

WILSON *v.* SMITH.

C. A.
1876
March 11.

[1873 W. 79.]

Practice—Costs—Security for Costs of Appeal—Rules of Court, 1875, *Order* LVIII., *r.* 15.

A Plaintiff appealed from a decree dismissing his bill. Upon proof of his having no means to answer the costs of an appeal, the appeal was stayed until he made a deposit of £50; but the Court declined to order that in default of his doing so within a given time the appeal should be dismissed.

Statement.

THIS was an application by the Defendant that the Plaintiff might be ordered to give security for the costs of an appeal.

The Plaintiff was a lodging-house keeper, and filed his bill in 1873 to restrain an alleged nuisance arising from the Defendant carrying on his business as a gasfitter at the rear of the Plaintiff's house. The bill was dismissed with costs by the Master of the Rolls, on the ground that substantial injury was not proved. The Plaintiff appealed under the new practice. The Defendant thereupon gave the present notice of motion. This was supported by an affidavit of the Defendant that the Plaintiff's leasehold interest in his house and the goodwill of his business were of trifling value, and that he had, on the 21st of October, 1875, given a registered bill of sale of his furniture to his housekeeper, Mrs. *Andrews*, to secure £148, and that the Defendant believed the Plaintiff to be considerably in debt to other persons, and to have no property except the above-mentioned leasehold interest, goodwill, and furniture, and to be insolvent and unable to pay the costs of the appeal. The Plaintiff filed an affidavit in opposition, denying his insolvency, and stating that he did not owe any debts. He admitted, however, that he had given the bill of sale for £148 on his furniture, which, with the leasehold interest and goodwill, he had purchased for £270, and he did not state that he had any other property.

Argument.

Bagshawe, Q.C., and *F. G. Bagshawe*, for the motion :—

Under Rules of Court, 1875, Order LVIII., rule 15, the Court

C. A. 1876 WILSON v. SMITH. Argument.

can order security for costs, though a deposit is no longer required as a matter of course; and where security is ordered it ought to be substantial security. Security for costs is required from a limited company, on the ground of its presumable impecuniosity, and this furnishes an analogy for ordering an insolvent Appellant to give security.

Chitty, Q.C., and *J. Chester, contrà*:—

The suit was instituted under the old practice, and the Court will not readily deprive the Plaintiff of the right of appeal which he had under that practice. Moreover, he is not proved to be insolvent, and his poverty is no reason for requiring security for costs.

Judgment, James, L.J.

JAMES, L.J.:—

I am of opinion that the Plaintiff ought to make a deposit of £50; and that the appeal should in the meantime be stayed.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Bagshawe then asked for an order that if the deposit was not made within a specified time the appeal should be dismissed.

THE COURT declined to make any such order.

Solicitors: *J. Haines; Miller & Miller.*

WITT *v.* CORCORAN.

C. A.
1876
March 22.

[1873 W. 184.]

Practice—Appeal for Costs—Discretion—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 49.

An order declaring that the Defendant had committed a breach of an injunction, but giving no directions, except that the Defendant should pay the costs of the application to commit, may be appealed from, and is not within the rule against appeals for costs.

Statement.

IN this case an injunction had been granted, and the Plaintiff had moved to commit the Defendant for breach. The Vice-Chancellor *Bacon* thereupon made an order "That, the Court being of opinion that the Defendant, *B. Corcoran*, has committed a breach of the said injunction, and the Plaintiff by his counsel not pressing to commit the said Defendant, this Court doth not think fit to make any order on the said motion, except that the Defendant do pay to the Plaintiff, *C. P. Witt*, his costs of this application, to be taxed by the Taxing Master."

From this order the Defendant appealed.

Sir *H. Jackson*, Q.C., and *Romer*, for the Appellant.

Argument.

Kay, Q.C., and *Nalder*, for the Respondent, objected that this was an appeal for costs, which was by sect. 49 of the *Judicature Act*, 1873, absolutely prohibited. Even under the old practice such an appeal could not have been maintained: *Taylor* v. *Dowlen* (1); *Hope* v. *Carnegie* (2). The order was simply that costs were to be paid.

Judgment, James, L.J.

JAMES, L.J.:—

It appears to me quite clear that this case is not one in which there is no appeal. The Act says that there shall be no appeal for costs where they are in the discretion of the Court, but there is no discretion as to whether a man has or has not been guilty of something alleged against him. The Defendant says he has been guilty

(1) Law Rep. 4 Ch. 697. (2) Law Rep. 4 Ch. 264.

C. A. 1876 WITT v. CORCORAN. Judgment.

of nothing, and if the Court had been of that opinion, it could not have ordered him to pay the costs, any more than it could dismiss a bill and order the Defendant to pay the costs of the suit. The Court has made an adjudication, and, as a consequence of that adjudication, has ordered the Defendant to pay the costs. If the Court had thought that no contempt had been committed, it could not have ordered the Defendant to pay the costs. The Defendant must have a right to appeal against that adjudication.

Mellish, L.J. MELLISH, L.J.:—

I am of the same opinion.

Baggallay, J.A. BAGGALLAY, J.A.:—

I also am of the same opinion. It appears to me that the introductory words of the order are really a substantial part of the order, and, as such, are matters for an appeal.

The motion on appeal was then heard on the merits, and dismissed with costs.

Solicitors: *Flower & Nussey; Bell, Brodrick, & Gray.*

C. A. 1876 *March* 2.

In re JONES.

Practice—Costs—Lunatic Trustee and Mortgagee—Reconveyance of Mortgaged Estate—Person appointed to convey—Trustee Act, 1850.

3 Ch D. 112
6 Ch D. 362

Property was mortgaged to two trustees of a settlement. The mortgagor had no notice of the trust. One trustee died, and the survivor became a lunatic. New trustees of the settlement were appointed under a power, but the mortgage debt was not transferred to them. The mortgagor gave notice to pay off the money. A petition was presented, asking that the new trustees might be appointed to reconvey the mortgaged property to the mortgagor on payment of the mortgage money:—

Held, that the costs of the petition must be paid out of the trust funds.

Statement. BY a deed, dated the 24th of June, 1872, and made between *W. H. Chapman* of the one part, and *W. E. Jones* and *F. D. Fox*

C. A. 1876 *In re* JONES.

Norton of the other part, some leasehold premises at *Walworth* were demised by way of mortgage by *Chapman* to *Jones* and *Norton*, their executors, administrators, and assigns, for the residue of a term of eighty years, except the last day thereof, to secure the payment of £350 and interest. The mortgage money was, in fact, trust money. The deed did not disclose this fact, but it contained the usual joint account clause. The same solicitor acted for both parties in the negotiation and carrying out of the mortgage, but he did not inform *Chapman*, and *Chapman* did not know, that the money advanced to him was trust money.

Statement.

On the 27th of January, 1873, *Norton* died, and on the 17th of February, 1873, *Jones* was found a lunatic by inquisition. On the 9th of May, 1873, *P. Bingham* and *A. Gliddon* were duly appointed trustees of the settlement to the trusts of which the mortgage money was subject, under a power therein contained, but the mortgage debt had not been transferred to them. The mortgagor had given notice to pay off the mortgage debt.

This was a petition under the Trustee Acts and in Lunacy, and it asked that *Bingham* and *Gliddon* might be appointed to re-assign the mortgaged property to the mortgagor, for all the estate of the lunatic therein, on payment of the mortgage money and interest to them. The Petitioners were the committee of the lunatic, and *Bingham* and *Gliddon*. The petition was not served on any one.

Argument.

Cecil Russell, for the Petitioners, said that the only question was, by whom the costs of the petition and consequent thereon should be paid. He referred to *In re Townsend* (1); *In re Lewes* (2).

Judgment, James, L.J.

JAMES, L.J., thought that the costs should be paid by the trustees out of the trust funds. The application was really for the purpose of completing their title to the trust property.

MELLISH, L.J., concurred.

Solicitors: *Martineau & Reid.*

(1) 1 Mac. & G. 686.

(2) 1 Mac. & G. 23.

C. A.

1875

C. J. B.

July 12, 19.

C. A.

Nov. 24;
Dec. 16, 17.

1876

Feb. 11.

13 CLD 605
14 CLD 268-9

Ex parte MORGAN. *In re* SIMPSON.

Court of Bankruptcy—Question of Fact—Trial by Jury—Power to set aside or disregard Verdict—Judicial Discretion as to Trial by Jury—Irregularity—Waiver—Recitals in Deed—Estoppel—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 59, 65, 66, 71, 72.

When a question of fact has been tried by a jury in the Court of Bankruptcy the Court cannot set aside or disregard the verdict, unless either there was no evidence to go to the jury, or, by reason of some matter of law or of some new fact, the verdict has become immaterial to the decision of the case.

If there was any evidence to go to the jury, and the verdict is, in the opinion of the Court, against the weight of the evidence, the proper course to get rid of the verdict is to order a new trial.

Ex parte Norton (1) questioned.

Under sect. 72 of the *Bankruptcy Act*, 1869, the Judge must exercise a judicial discretion whether a question of fact should be tried by a jury. One party is not entitled as of right to demand a jury.

An order for the trial of a question of fact by a jury was made upon the demand of one party only:—

Held, that the order was only irregular, that the irregularity could be waived, and that it had been waived by both the parties appearing on the trial without taking the objection.

Recitals in a deed do not operate as an estoppel against a party to the deed in an action not founded on the deed, but collateral to it.

Statement.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

The question in the case was as to the amount for which *Thomas Morgan* should be admitted to prove against the estate of *Walter Simpson* and *Frederick Simpson*, who were cotton-spinners at *Preston*, and who filed a liquidation petition on the 19th of December, 1872, under which *D. Smith* was appointed trustee. The debtors carried on their business under the firm of *John A. Simpson, Sons, & Co.* This firm had formerly consisted of four partners, viz., *C. J. Simpson*, *A. Simpson*, and the debtors, the debtors being the survivors.

Thomas Morgan was a merchant and commission agent at *Manchester*, carrying on his business under the firm of *Thomas Morgan & Co.* On the 2nd of August, 1869, a deed was executed between

(1) Law Rep. 16 Eq. 397.

C. J. Simpson, A. Simpson, and the debtors (who then composed the firm of *John A. Simpson, Sons, & Co.*), of the one part, and *Morgan* (described as a commission agent) of the other part. This deed contained recitals that *Morgan* carried on the business of a commission agent at *Manchester;* that *Simpson & Co.* had for some time past consigned part of their cloth to *Morgan & Co.* for sale; that it had been agreed that *Morgan* should employ *Edward Hayes* and *Frederick Simpson* as the salesmen of *Morgan & Co.* for the sale of all the cloth and yarn consigned to or sold by them for a term of five years, at a salary to be paid to each of them, the said *Edward Hayes* and *Frederick Simpson,* equal to one-third of the net profits arising from the said commission agency business, and under and subject to the other stipulations expressed in another deed of even date; and that *Simpson & Co.* should consign to *Morgan & Co.* all the cloth manufactured by them, for such term, and subject to such stipulations as were thereinafter contained. And it was thereby agreed that, notwithstanding the partnership of *Simpson & Co.,* it should be lawful for *Frederick Simpson* to act as such salesman; and further, that *Simpson & Co.* should, during the term of five years from the date of the deed, consign to *Morgan & Co.* for sale all and every the cloths manufactured by *Simpson & Co.,* and that *Morgan & Co.* should accept and take into their charge all such cloths as should be so consigned accordingly, and also should use their best endeavours to sell and dispose of the same to the best profit and advantage, and should keep correct accounts of all such cloths as should be from time to time consigned to them for sale, and of all sales made, moneys and securities received, and transactions done of for or concerning the cloths, and should every month deliver to *Simpson & Co.* such accounts, and the balance of the moneys so to be received, deducting commission and necessary charges and expenses; and at the expiration of the term should deliver up to *Simpson & Co.* all such cloths as should remain unsold in the custody of *Morgan & Co.,* and that *Morgan & Co.* should be absolutely responsible to *Simpson & Co.* for the cloths sold by *Morgan & Co.* as aforesaid, at the price for which the same should have been disposed of. And it was further agreed that *Simpson & Co.* should allow to *Morgan & Co.* the sum of 4 per

C. A. 1875 *Ex parte* MORGAN. *In re* SIMPSON. Statement.

cent. on the price at which they should sell the goods consigned to them for sale as aforesaid, and which sum of 4 per cent. should include any discount to be allowed to a purchaser.

The deed of even date referred to was a deed made between *Morgan* of the first part, *Edward Hayes* of the second part, and *Frederick Simpson* of the third part, by which *Morgan* agreed to employ *Hayes* and *Frederick Simpson* as salesmen for him for the sale of all cloth or yarn consigned to be sold by him for a term of five years, at the salaries mentioned in the other deed, and they respectively agreed to act as such salesmen accordingly.

On the 27th of September, 1871, *A. Simpson* died; and on the 15th of January, 1872, *C. J. Simpson* died. The business was thenceforth carried on by the two survivors until the 19th of December, 1872, when they filed a liquidation petition in the *Manchester* County Court. During the whole of this period the cloths manufactured by *Simpson & Co.* were consigned by them to *Morgan*, and were sold by him, and accounts were from time to time rendered by him to them.

On the 7th of May, 1874, *Morgan* tendered to the trustee under the liquidation a proof against the estate for the sum of £3211 17*s.* 1*d.* His affidavit of proof stated that the claim was made "for goods sold and delivered by me to the said *W. Simpson* and *F. Simpson* at their request, and for money lent and advanced by me to them at their request, and for money payable by them to me for work done for them at their request, and for money paid by me for them at their request, and for commission agreed to be paid by them to me for the sale of cotton goods by me for and on account of the said *W. Simpson* and *F. Simpson*, and for interest on the forbearance at interest of moneys owing by them forborne by me at their request."

On the 2nd of July, 1874, *Morgan* was examined before the Registrar of the Court by the trustee. In the course of his examination he was questioned with reference to an account of sales for the month of June, 1872, which was headed "Sales by *J. A. Simpson, Sons, & Co.*, to *Thomas Morgan & Co.*" He was asked whether he had charged in that account a commission for the sale of the goods comprised in it, and he answered that he had, that his doing so was in accordance with a verbal agreement

entered into between himself and the *Simpsons* from the very beginning. On being further pressed, he said that throughout the transactions between the *Simpsons* and himself their goods were not consigned to him for sale, but were sold by them to him at fixed prices, he being entitled to retain whatever extra profit he made upon the resales, in addition to a discount or commission of 4 per cent. He further stated that the written agreement contained in the deed of the 2nd of August, 1869, was never acted upon, because it was found that it did not express the real intention of the parties, and that the verbal agreement was entered into within a week or two after the date of the deed.

On the 3rd of November, 1874, the trustee gave notice to *Morgan* that he rejected his claim against the estate to the extent of £2332 2*s.* 1*d.* Of this sum £583 11*s.* 6*d.* had been already admitted by *Morgan* to have been claimed in error. The rest of it, viz., £1748 10*s.* 7*d.*, was rejected by the trustee "upon the ground that, upon your various account sales furnished to the debtors, you have from time to time credited them with less amounts, as received by you from the sales of their cloth, than what you have actually received, and such differences in prices amount altogether to £1748 10*s.* 7*d.*" On the 16th of November, 1874, *Morgan* gave notice of his intention to apply to the Court for an order to admit his proof for the £1748 10*s.* 7*d.*, in addition to the amount for which it had been already admitted. The application was heard by the Judge on the 26th of November, 1874, and an order was made that an issue or issues should be tried to determine whether *Morgan* was entitled to prove against the estate for the £1748 10*s.* 7*d.* in addition to the £879 15*s.* for which his proof had been already admitted by the trustee. And it was further ordered that the hearing of the motion to admit the proof should be adjourned till after the trial of the issues; and that in case of dispute the issues should be settled by the Judge. An issue was afterwards settled by the Judge in the following form:—

"Between *Thomas Morgan* . . . Plaintiff,
and
David Smith, (as trustee) . . . Defendant.

"The Plaintiff affirms, and the Defendant denies, that the

C. A. 1875 *Ex parte* MORGAN. *In re* SIMPSON. Statement.

Plaintiff, in the business transactions between his firm and the debtors, acted as principal, and not as agent for them; and that the debtors were, on the 7th of May, 1874, and still are, indebted to the Plaintiff in respect of such transactions in the sum of £1748 10*s.* 7*d.*, in addition to the sum of £879 15*s.*, for which the trustee has already admitted the Plaintiff's proof of debt; and further, that the Plaintiff is entitled to prove upon the debtors estate for, and to receive dividends in respect of, the said sum of £1748 10*s.* 7*d.*, or some part thereof."

The Judge suggested that the issue should be tried by a jury instead of by himself, and both the parties assented to this course. The order, however, which was actually drawn up, directing the trial to be before a jury, stated that it was made upon the demand simply of *Morgan.*

The trial took place on the 13th of May, 1875. After the evidence had been given the Judge put two questions to the jury:—

(1.) Did the deed of the 2nd of August, 1869, carry out the arrangement between the parties?

(2.) Did the debtors know of the way in which the Plaintiff was dealing with the goods, and assent thereto?

The jury answered the first question in the negative, and the second in the affirmative, whereupon the Judge directed the verdict to be entered for the Plaintiff *Morgan.* The counsel for the trustee then asked the Judge to stay the making of any further order upon the finding until the next day, in order that the trustee might have time to consider whether he should move for a new trial. The Judge said that, though he himself might have come to a different conclusion upon the evidence, he could not interfere with the verdict, and should not grant a new trial. An order was accordingly made admitting the proof of *Morgan* for the £1748 10*s.* 7*d.* The trustee appealed to the Chief Judge. The notice of appeal motion asked that the order admitting the proof might be rescinded and discharged, reversed, altered, or varied, and that the verdict obtained on the trial of the issue might be set aside, and a verdict entered for the Defendant, or a new trial had between the parties.

The appeal to the Chief Judge came on to be heard on the 12th and 19th of July, 1875.

Little, Q.C., and *Smyly*, for the trustee :— Argument.

The Court is not bound by the finding of a jury; the issue is directed only to inform the mind of the Court: *Ex parte Norton* (1); *Ex parte Gillebrand* (2). The agreement between the parties was only for an agency; there was no case of mutual mistake, and the Judge was wrong in so directing the jury.

Ambrose, Q.C., and *Jordan*, for *Morgan* :—

The evidence shews that *Morgan* was to be an agent, with the addition of a right to become a purchaser himself, and to retain the profits which he might make by re-sales. The Court can direct a new trial, but cannot set aside the verdict of a jury on a question of fact: *Ex parte Bolland* (3). In *Ex parte Norton* the application of the law had been left to the jury.

BACON, C.J., after referring to the facts and the evidence, continued :— Judgment, C. J. B.

In my opinion there was no evidence to justify the jury in coming to the conclusion that the arrangement made by the deed had ever been departed from. There is no evidence that it was ever departed from in a single instance. And when it is said that the debtors knew the way in which their agent was dealing with the goods of the firm, I answer that there is no evidence of that, except that Mr. *Frederick Simpson* must of necessity have known it. But on the question whether it ever was brought to the knowledge of the firm, I should not hesitate one moment, if that were all in the case, to say that the jury have drawn an erroneous conclusion from the facts. But that is not all. The learned Judge of the County Court seems, by his summing-up of the evidence, to have been impressed with the responsibility of departing from the deed, and in plain and explicit terms he called the attention of the jury to the relation between the parties agreeing with every transaction in which each was engaged. Still he left it to the jury to say, whether the deed did carry out the intention of the parties. I do not think that that was a right direction. I quite agree with Mr. *Jordan* in the observation which he made on this part of the

(1) Law Rep. 16 Eq. 397. (2) Law Rep. 10 Ch. 52.
(3) Law Rep. 7 Ch. 24.

C. A. 1875

Ex parte MORGAN. *In re* SIMPSON.

Judgment, C. J. B.

case, that an agreement of whatever kind may, by the parol assent of both parties, be relinquished and abandoned, but the abandoning of a deed is a totally different thing from making a new contract. An agreement under seal even may be abandoned for a consideration, and on that being proved it would put an end to a deed; it does not require a new agreement to do so. But if the deed was not put an end to the Appellant's case is right, because he proves that *Morgan*, being an agent, has made a much larger profit than he has accounted for to his principals, and, unless the *Statute of Frauds* has been passed in vain, and the decisions upon it are to be disregarded, I say that no such agreement as Mr. *Morgan* sets up can be rested upon evidence of any kind, and that the jury were not competent to try such a question. They might have found that the deed had been wholly abandoned, but no such case as that has been made.

I think, therefore, that the jury were wrong in the conclusion which they drew. I decline to be bound by the verdict in any respect. I find, and the fact is unquestioned, that there is a binding deed between the parties, containing stipulations which must be enforced. I find that the £1748 10*s.* 7*d.* is properly deducted from Mr. *Morgan's* demand, and the order now to be made ought so to declare.

Little, Q.C.:—Your Lordship does not think it necessary in point of form that the verdict now entered for Mr. *Morgan* should be entered for the trustee?

BACON, C.J.:—Oh, no. I decline to be bound by it. I make my order notwithstanding the verdict.

The order made upon this judgment directed that, notwithstanding the verdict of the jury, the order of the County Court admitting the proof should be rescinded and discharged, and that *Morgan's* application to admit the proof for the £1748 10*s.* 7*d.* should be dismissed.

Morgan appealed.

C. A. The appeal came on to be heard on the 24th of November, and the 16th and 17th of December, 1875.

Ambrose, Q.C., and *Bigham*, for the Appellant:—

We contend that, upon the evidence, the finding of the jury was right; *Morgan* was a principal, not an agent, and was also entitled to commission. But, at any rate, the Chief Judge was not right in setting aside the verdict of the jury. If he thought the verdict wrong, he ought to have directed a new trial to take place: *Ex parte Bolland* (1).

[BRETT, J.:—Suppose there was no evidence to go to the jury?]

Still a new trial ought to have been ordered; the Court does not decide upon the amount of the evidence to go to the jury: *Fulton* v. *Andrew* (2). We made what was in effect an application to the County Court Judge for a new trial, and it was refused. The Chief Judge could have ordered a new trial, as indeed we asked by our appeal to him; and this Court can now do what he should have done. The Court will not go into the question of the *quantum* of evidence; if there is any evidence at all, it will not disturb the finding of a jury without directing a new trial. In *Gray* v. *Turnbull* (3), Lord *Westbury* said that, "when a question of fact has once been decided by the verdict of a jury, it requires an overwhelming case of error by the jury, or the disregard of some cardinal rule of law, to induce the Court to grant a new trial." That principle applies *à fortiori* to setting aside a verdict without a new trial. If this is done, questions of fact will be in effect tried by the Court, not by the jury, and trial by jury will be an empty form.

The counsel for the trustee were directed by the Court to confine themselves to the question, whether a new trial ought to have been ordered by the Chief Judge.

Little, Q.C., and *Smyly*, for the trustee:—

We say that the Court is at liberty to disregard the finding of the jury. The Court has to administer the estate, and it must decide upon the proof. In the present case the Appellant's affidavit of proof, with which he launched his case, is totally inconsistent with

(1) Law Rep. 7 Ch. 24.
(2) Law Rep. 7 H. L. 448.
(3) Law Rep. 2 H. L., Sc. 53, 55.

C. A. 1875 *Ex parte* MORGAN. *In re* SIMPSON. Argument.

the claim which he has since set up. The affidavit is only consistent with his being a mere agent. The issue which was actually tried was utterly irrelevant, and ought never to have been directed, and the verdict was entered upon a question which was never put to the jury at all.

[MELLISH, L.J.:—But can the Court disregard the verdict without directing a new trial? If it can, the right given by sect. 72 of the *Bankruptcy Act* to have a question of fact tried by a jury is a nullity.]

The Chief Judge has constantly held that the Court can disregard the verdict of a jury: *Ex parte Norton* (1).

[MELLISH, L.J.:—Before the present *Bankruptcy Act*, such questions as order and disposition, and fraudulent preference, were always tried in the Courts of law.]

But a question of proof was always within the exclusive jurisdiction of the Court of Bankruptcy. In *Ex parte Gillebrand* (2) it was held by the Court of Appeal that the finding in a County Court on the trial of an issue of fact was not conclusive.

[JAMES, L.J.:—There the issue had been tried by the Judge himself, without a jury. Was not the effect of that decision simply this, that the rule laid down by the House of Lords in *Fernie* v. *Young* (3) with regard to the finding of a Judge of the Court of Chancery, acting as a jury on a question of fact, does not apply to a Bankruptcy Judge?]

The material sections of the *Bankruptcy Act*, 1869 (32 & 33 Vict. c. 71), are sects. 65, 66, 71, and 72 (4).

(1) Law Rep. 16 Eq. 397, 411.
(2) Ibid. 10 Ch. 52.
(3) Ibid. 1 H. L. 63.
(4) Sect. 65 provides that "the Chief Judge in Bankruptcy shall have all the powers, jurisdiction, and privileges possessed by any Judge of Her Majesty's Superior Courts of Common Law at *Westminster*, or by any Judge of Her Majesty's High Court of Chancery."

By sect. 66, "Every Judge of a local Court of Bankruptcy shall, for the purposes of this Act, in addition to his ordinary powers as a County Court Judge, have all the powers and jurisdiction of a Judge of Her Majesty's High Court of Chancery."

Sect. 71 provides that the Court of Appeal in Chancery for the purposes of this Act, "shall have all the jurisdiction, powers, and authorities of the Court of Bankruptcy, to be exerciseable either originally or on appeal, and shall have all the powers and authorities of the

In the present case the order for the trial by a jury was irregular, because it appears to have been made on the demand of *Morgan* alone. Under sect. 72 such an order can only be made on the application of both parties, or if the Judge himself thinks it desirable. It may be essential that the Judge should have the assistance of a jury in determining a question of fact, but that does not absolve him from the duty which is cast upon him by the prior part of sect. 72, of deciding all questions, whether of law or fact, which it is necessary to decide in order to make a complete distribution of the bankrupt's estate.

The original application to the Court stands over until the trial of the issue has taken place, and the final order made by the Court goes back to the original application. The trial by the jury is only for the purpose of informing the conscience of the Court. Section 72 says "may," not "shall." The jurisdiction of the Court of Bankruptcy under the Act is an equitable one, and is to be exercised in the same way as that of the old Court of Chancery. The practice of that Court was to disregard, if it thought fit, the findings of juries: *Daniell's* Chancery Practice (1); *Armstrong* v. *Armstrong* (2).

[JAMES, L.J.:—In that case the verdict was not set aside, but,

---

Court of Chancery relative to the trial of questions of fact, by jury, issue, or otherwise."

And by sect. 72, "Subject to the provisions of this Act, every Court having jurisdiction in bankruptcy under this Act shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, arising in any case of bankruptcy coming within the cognizance of such Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case: . . . . and if in any proceeding in bankruptcy there arises any question of fact which the parties desire to be tried before a jury instead of by the Court itself, or which the Court thinks ought to be tried by a jury, the Court may direct such trial to be had, and such trial may be had accordingly."

And sect. 18 of the *Judicature Act*, 1873 (36 & 37 Vict. c. 66) transfers to the Court of Appeal "all jurisdiction and powers of the Lord Chancellor and of the Court of Appeal in Chancery, in the exercise of his and its appellate jurisdiction, and of the same Court as a Court of Appeal in Bankruptcy."

(1) 4th Ed. p. 1041; 5th Ed. pp. 1008, 1016.

(2) 3 My. & K. 45.

C. A. 1875

Ex parte MORGAN.

In re SIMPSON.

assuming it to be right, there were new facts before the Court which rendered it immaterial.]

Morrison v. *Barrow* (1) is another instance.

[JAMES, L.J.:—In that case the judgment was *non obstante veredicto.*]

Section 66 only gives the County Courts acting as Courts of Bankruptcy the jurisdiction and powers of the Court of Chancery.

Ambrose, in reply.

Judgment, C.A., James, L.J.

1876. Feb. 11. JAMES, L.J.:—

13 L.T. 605

I have, after much hesitation and no little fluctuation of opinion, come to the conclusion that we cannot avoid sending this case down for a new trial. I take the rule in Chancery and in Bankruptcy with respect to verdicts of juries to have been substantially the same as in the Common Law Courts—viz., that the finding must be considered as a *res judicata,* conclusive between the parties unless and until it is set aside. But in Chancery and in Bankruptcy the Court has also substantially the same powers as the Courts of Common Law had to pronounce a judgment *non obstante veredicto.* If, assuming the finding of the jury to be correct, that the fact or facts is or are as found by them, there are other facts, or other considerations, which enable the Court to pass over that finding, and to pronounce a decree or make an order adverse to the party who has obtained the verdict, the Court is entitled to pronounce such decree or make such order. I was for some time under a strong conviction that this case might have been so dealt with. There are no pleadings in the case except the affidavits in support of the Appellant's proof, and in those the relation between him and the debtors is distinctly stated as the relation of principal and commission agent, and it appeared to me at first that the issue, whether the relation between them was not in fact that of vendor and purchaser, was so inconsistent with the claim that we might treat it and all that followed

(1) 1 D. F. & J. 633.

it as a nullity. But I have been convinced that that would not, either technically or substantially, be a correct way of disposing of the matter. The affidavits are not in the nature of a record or pleading. They are strong—very strong—as evidence against the deponents. But, with these affidavits before the Court, the Court, in the presence of and apparently without any objection from the parties, settled an issue which was considered to raise the real matter to be tried, and from the order directing that issue there was not, and is not, any appeal, and I think that we are bound for the present purpose to consider that issue as properly directed. Considering it, then, as a verdict upon an issue properly directed, what is to be done with it? Can we disregard it because it is, as alleged, clearly against the weight of the evidence? I am of opinion that the Court of Chancery never assumed any such authority. I recollect a case of *Evans* v. *Prothero* (1) in which an issue was directed, and in which, although it was a very small matter in point of amount, £21, Lord *Cottenham*, being of opinion that there was no real evidence other than a document which was legally inadmissible, but which was read out by counsel in his speech, sent the matter down for a new trial. The new trial was had, with the same evidence, the same reading, and the same result, but Lord *Cottenham* did not consider himself entitled to disregard the verdict, but sent it down again for a new trial, which came off with the same evidence and the same result, and, probably, the thing would have gone on until either the Chancellor or the Welsh juries gave in, but that a new Chancellor arose who held that the document was after all legally admissible (2). But, beyond all question, with the strong view Lord *Cottenham* took of the case, he would, if he had felt himself so warranted by the principles and practice of the Court, have disregarded the verdict, and dismissed the Plaintiff's bill, which was for the specific performance of a contract.

It is said, however, that there was no evidence—no substantial evidence—and that the Judge ought to have so held, and ought to have done what was equivalent to directing a verdict against the Plaintiff in the issue or have nonsuited him. I am unable to arrive at that conclusion. I content myself with stating that generally,

(1) 2 Mac. & G. 319. (2) 1 D. M. & G. 572.

C. A. 1876

Ex parte MORGAN. *In re* SIMPSON.

Judgment, C.A., James, L.J.

as I am aware that that point will be more fully discussed in the judgments of my colleagues. But, for myself, I have no doubt that the verdict was clearly against the weight of evidence.

And in the conduct of the trial there was, in my judgment, a serious miscarriage. No such question ought to have been put to the jury as that which was put to them as to the deed; no such evidence ought to have been allowed as that which was given in this case, that the deed did not correctly express the intention of the parties, or that they did not understand it, viz., evidence of one of the parties that he did not understand it, and that the other party had, in conversation with him, admitted the same. No doubt there is an equity, under some circumstances, to set aside a deed. There is an equity to rectify a deed. But it must be judicially set aside or rectified, and, unless and until that is done, it is a violation of first principles to allow evidence as to the meaning and intention of parties, when there is an actual agreement in writing, the record of that meaning and intention.

It is, however, quite possible that the recital in the deed may be erroneous as to the previous arrangement. It is quite possible that in fact after entering into such an agreement the parties may have found it not workable, and have superseded it by another agreement, either expressed or to be inferred from course of dealing. They may have entered into an agreement to give up the relation of principal and agent, and to become simply vendor and purchaser, as found by the verdict of the jury. But it was the duty of the Judge to have told the jury that it required the strongest evidence to support the contention that the recital was not true, and that it required like evidence to shew that there was such a substituted agreement, and what that agreement was. I cannot but suspect myself that the suggestion of such a new agreement was an after-thought of counsel when it became necessary to account for and justify the fact that the Appellant had received more from the purchasers of some of the goods than he had accounted for. The real case of the Appellant seems to have been that he had bought all the goods out and out, but that he filled a kind of hybrid character, viz., that he being agent was entitled to make for himself extra profits if he realized more than the price talked of between him and his principal as to any particular

parcel of goods. I will not say that such an agreement may not be made if the parties, being of sound mind and really understanding what they are saying and doing, deliberately enter into it, although it is almost repugnant to the very relation of principal and agent.

But that is not what is alleged by the issue, which if it is, as I have held, binding on the one party is also for the present purpose binding on the other, viz., the Appellant to make out his issue must prove that he was not agent but purchaser, and he must be confined to that issue.

Judgment, C.A., James, L.J.

I have said that there was, in my judgment, evidence to go to the jury on that simple issue, and I am constrained, therefore, to give my voice for sending it again to be tried.

MELLISH, L.J.:—

Mellish, L.J.

This is an appeal from a decision of the Chief Judge, by which he reversed a decision of the County Court Judge at *Manchester*, which was founded on the verdict of a jury, and rejected the claim of Mr. *Morgan*, the Appellant, to prove against the estate of Messrs. *Simpson*, liquidating debtors, to an amount beyond the sum admitted by the trustee.

On the hearing before us we were all of opinion that the verdict of the jury was not satisfactory, and we heard the counsel for the Respondent only upon the question whether the Chief Judge was right in at once rejecting the proof, or whether the proper course was not to order a new trial of the issue; and we took time to consider that question.

Now I am of opinion that, if there was no evidence before the jury to support the case of Mr. *Morgan*, and it was the duty of the County Court Judge at the trial to have directed the jury to find the issue for the trustee, the Court is not obliged to go through what would be the perfectly idle form of ordering a new trial, in order that on the new trial the County Court Judge might direct a new jury to find for the trustee. But, on the other hand, if the evidence was such that the Judge ought not to have withdrawn the case from the consideration of the jury, then, although in the opinion of the Court the verdict was against the weight of the evidence, the proper course, in my opinion, is to order a new trial

C. A. 1876 *Ex parte* MORGAN. *In re* SIMPSON. Judgment, C.A., Mellish, L.J.

of the issue. I think that this is merely an issue to inform the conscience of the Court, and I do not mean to lay down that the Court has not jurisdiction to decide the case for itself without regard to the verdict of the jury; but the practice, both of the Court of Chancery and of the Court of Bankruptcy, as far as I can make out, always has been in such cases to order a new trial of the issue, and Mr. *Little* was unable to produce a single case in which, when an issue has once been properly ordered, the Court of Chancery has acted contrary to the finding of a jury, without ordering a new trial, simply because the Court was not satisfied with the conclusion which the jury had drawn from the evidence, and I think that it is of great importance that the ordinary practice should be adhered to. The Court of Appeal is bound to make the order which it thinks the Judge of first instance ought to have made, and, therefore, we ought not to set aside the verdict of the jury without ordering a new trial, unless we think that the County Court Judge ought himself to have done so. It seems to me, however, that it would be a most unsatisfactory mode of administering justice if a County Court Judge, after properly taking the opinion of a jury upon a particular issue upon which the result of the case depended, might decide the case contrary to their finding, without taking the opinion of another jury, simply because he differed from the conclusion to which the jury had come on the evidence.

It was indeed argued by Mr. *Little* that in this case the issue was not properly ordered, and that the Court ought on this account to deal with the case as if no issue had been ordered. The actual proceedings before the County Court are not very clearly explained. The claim to prove was, no doubt, a claim to prove as commission agent for £2628 5*s.* 7*d.* The trustee admitted the claim to the extent of £879 15*s.*, but rejected the rest, on the ground that there was a set-off for sums received by *Morgan* for the price of goods sold and not accounted for. *Morgan* admitted that he had received these sums, but contended that he was entitled to retain them, on the ground that he was the purchaser of the goods from the *Simpsons*, and entitled to resell at a profit. The case then came before the Judge, and, according to the Judge's statement, he was the person who recommended that

the case should be tried by a jury. Both parties appear to have acquiesced in this suggestion. If the order was made in this way it was perfectly regular, and cannot now be set aside. In drawing up the order, however, the Registrar appears to have entered, first, an order by the Judge that the issue should be tried before himself, and, secondly, a demand by Mr. *Morgan* that the case should be tried by a jury. I conjecture that this was merely a mistake in drawing up the order, but it is unnecessary to determine this, because I am clearly of opinion that all objections to the regularity of the order directing the issue to be tried by a jury were waived by the parties appearing at the trial without objection. I proceed, therefore, to consider whether there was any evidence in support of the case of *Morgan*. [His Lordship read the issue.]

There was no doubt that, from the middle of 1868 up to the stoppage of Messrs. *Simpson* in 1874, Messrs. *Simpson* had delivered large quantities of goods to Mr. *Morgan*, and that Mr. *Morgan* had sold those goods and had received from Messrs. *Simpson* a commission of 4 per cent. for selling them, and the question in dispute was whether Mr. *Morgan* had acted as a commission agent, or, what was called in the argument before us, a commission merchant. A commission merchant was said to differ from a commission agent in this, that a commission merchant, though he was entitled to charge a commission and all other charges as if he was a mere agent, was really the purchaser of the goods, and only answerable to his principal for the price at which his principal had agreed with him to sell his goods, and was entitled to retain any profit beyond that which he might obtain from the purchaser of the goods. To a lawyer it seems almost a contradiction in terms that a person selling the goods of another should be entitled to charge a commission for selling them, and yet should be a purchaser, and not a mere agent. Still, if a manufacturer and a commission agent make an express bargain that they will deal with each other upon these terms, and choose to call that commission which the law calls discount, there is no law to prevent them doing so, though it is obvious that, before the Court or a jury could come to the conclusion that these actually were the terms upon which parties were dealing, they ought to be certain that the manufacturer really so understood them, and that the

C. A. 1876 — *Ex parte* MORGAN. *In re* SIMPSON. — Judgment, C.A., Mellish, L.J.

alleged mode of dealing as a commission merchant is not a mere pretence, set up by the commission agent to enable him to retain the profits which he has improperly earned without the knowledge of his principal. A jury, however, in determining the question may be properly to some extent influenced by their own knowledge whether such a mode of dealing is usual or not. Besides documentary evidence, there was the evidence of Mr. *Morgan* and of Mr. *Hayes*, who was a clerk of Mr. *Morgan*, receiving one-third of the profits of his business, on the one side, and the evidence of the liquidating debtors on the other side, and, independently of the effect of two deeds of the 2nd of August, 1869, which I will consider presently, the case would resolve itself into a direct conflict of testimony between the witnesses on the one side and on the other. [His Lordship referred to the evidence.]

I have read through the shorthand writer's notes of the evidence, and of the summing up of the County Court Judge, and the result seems to me to be that, both by the counsel and by the Judge, *Morgan* and *Hayes* on the one side and the *Simpsons* on the other were considered to have directly contradicted each other. Under these circumstances it was plainly for the jury to decide which of the two parties was to be believed, unless the deeds of the 2nd of August, 1869, ought to have been held, either at law or in equity, conclusive on the subject.

[His Lordship read the provisions of the first deed, as above stated, and continued:—]

There can be no doubt that this deed afforded very strong evidence against the case of *Morgan*, that he was a purchaser and not an agent, but it is necessary to consider whether it was in point of law conclusive; and this involves two separate questions—first, was the deed conclusive that *Morgan* acted as the commission agent of the *Simpsons* in the sale of the goods which were sold prior to the execution of the deed? and, secondly, was it conclusive that he acted as agent in the sale of the goods which were sold after the execution of the deed? Now, with respect to the first question, the deed could have no direct effect upon the sale of the goods which were sold before it was executed, but it contains a recital that Messrs. *John Simpson, Sons, & Co.* had, for some time, consigned part of their cloth to the said *Thomas*

Morgan for sale, and this recital, no doubt, affords strong evidence against *Morgan* that he acted as the agent of the *Simpsons* in the sale of the goods which were sold before the deed was executed. But I think it is clear that if an action had been brought by Messrs. *Simpson* against *Morgan* to recover the profits which he had gained by selling the goods at a higher price than he had accounted for to the *Simpsons*, *Morgan* would not have been concluded by this recital. The rule of law on the subject is laid down by Baron *Parke* in the case of *Carpenter* v. *Buller* (1), where he says: "If a distinct statement of a particular fact is made in a recital of a bond or other instrument under seal, and a contract is made with reference to that recital, it is unquestionably true that, as between the parties to that instrument and in an action upon it, it is not competent for the party bound to deny the recital . . . . But there is no authority to shew that a party to the instrument would be estopped in an action by the other party, not founded on the deed, and wholly collateral to it, to dispute the fact so admitted, though the recitals would certainly be evidence."

The rule so laid down has been recognised and acted upon in subsequent cases, and, applying the rule to this case, it seems to me that the claim of the trustee, so far as it relates to the goods which were sold before the deed was executed, is not founded on the deed, but is collateral to it. With respect, however, to the goods which were sold subsequent to the execution of the deed, I think that the deed would be conclusive, unless there was evidence on the part of *Morgan* that, by a distinct subsequent agreement, it was agreed between him and Messrs. *Simpson* that the goods should be delivered to him as the purchaser instead of being consigned to him as agent for sale; and that the goods were accordingly delivered to him as a purchaser under such subsequent agreement. I am also of opinion that such subsequent agreement was capable of being made by parol, and did not require, even at law, that a fresh deed should be executed. I cannot conceive how the deed could deprive Messrs. *Simpson* and Mr. *Morgan* of the power of selling goods by the one to the other to any extent in the ordinary way. I also think that the evidence of *Morgan* and *Hayes* does, in substance, amount to evidence that such a new agreement was actually entered into.

(1) 8 M. & W. 209, 212.

C. A.
1876
Ex parte MORGAN.
In re SIMPSON.
Judgment, C.A., Mellish, L.J.

Still, it may be said that, although there is some evidence in support of *Morgan's* case, it is a mere scintilla of evidence. I am not aware, however, that the convenient doctrine of the evidence only amounting to a scintilla has ever been applied to a case where a witness has positively sworn to something having taken place within his own knowledge by which, if it did take place, the case was proved. However overwhelming the evidence may be on the other side, the Judge must, in my opinion, in such a case leave the question to the jury. The test whether the evidence only amounts to a scintilla is to assume that there was no evidence to contradict the evidence which is said only to amount to a scintilla, and then to inquire whether there would be evidence which would justify the jury in finding a verdict. Now it is plain that, if the evidence of *Morgan* and *Hayes* was uncontradicted, it would be sufficient to justify a verdict. Moreover, the case of *Morgan* is to some extent corroborated by the accounts of sales subsequent to May, 1870, being headed "Sales to Messrs. *Morgan & Co.* by *Simpson, Sons, & Co.*," and by the admitted fact that *Frederick Simpson* knew that goods were being sold by *Morgan* at higher prices than those charged by the *Simpsons*, and made no objection to it.

On the other hand, the case of the trustee is very strongly corroborated, not only by the deed, but by the fact that *Morgan* in his first affidavit claimed as a commission agent; that the accounts of sales prior to May, 1870, were, as far as they were given in evidence, made out as sales on account of *Simpson, Sons, & Co.* by *Thomas Morgan & Co.;* and by the unusual nature of the agreement sworn to by *Morgan*.

It is perhaps necessary to consider how the case was dealt with at the trial. *Morgan* was the first witness called, and when he was asked what was the arrangement made between the parties at the time they commenced business, the counsel for the trustee objected to the question, on the ground that the parties could not go behind the deed. Thereupon the Judge expressed an opinion that he had equitable as well as legal jurisdiction, and that in equity the deed would not be conclusive; and from that time the case was conducted on the footing that the material question to be decided was, whether the deed by mutual mistake was framed in such a way as not to carry out the real

intention of the parties; and at the end of the case the learned Judge left to the jury the question, "Did the deed of the 2nd of August, 1869, carry out the arrangement between the parties?" to which the jury answered, "No." He also, on the pressure of counsel, but expressing his own opinion that it was unnecessary, left to the jury a second question, "Did the bankrupts know the way in which the Plaintiff was dealing with the goods, and assent thereto?" to which the jury answered, "Yes." Now, if the deed was really conclusive at law, and the real question to be decided was, whether the deed was framed under such circumstances of mutual mistake that it ought to be rectified or set aside in equity, I should have doubted whether there was any evidence to go to the jury, because a Court of Equity does not set aside or reform a deed on doubtful contradictory evidence. But, for the reasons already given, I am of opinion that the deed was not conclusive at law. I do not think that the way in which the case was left to the jury really affected the verdict, because it is obvious that the jury must have come to the conclusion that the evidence of *Morgan* and *Hayes* was to be believed in preference to that of the *Simpsons*. If, however, there was a misdirection, it was one against Mr. *Morgan*, and not one in his favour. If there is a new trial, the proper questions to leave to the jury, in my opinion, are: First, were the goods which were delivered by the *Simpsons* to *Morgan*, prior to the execution of the deed of the 2nd of August, 1869, consigned by the *Simpsons* to *Morgan* for the purpose of sale as the *Simpsons'* agent, or sold by the *Simpsons* to *Morgan* as a principal at prices agreed upon between them? and, secondly, was there, after the deed was executed, an agreement between the *Simpsons* and *Morgan* that the *Simpsons* should not consign their goods to *Morgan* as their agent for sale upon the terms of the deed, but should sell their goods to *Morgan* as a principal; and were the goods subsequently delivered sold on those terms? And I think that the jury should be told that the fact of the deed having been executed by *Morgan*, and of a commission being charged by him, was strong evidence against him on both questions, but was not in point of law absolutely conclusive. I think that the second question which was left to the jury at the trial ought not to have been left to them at all.

C. A. 1876

Ex parte MORGAN. *In re* SIMPSON.

Even if the *Simpsons* did know that *Morgan* was selling their goods at a profit to himself, and did not object to it, I think it would be no answer to an action for a breach of the express covenant on the part of *Morgan* to pay over to the *Simpsons* the entire proceeds of the goods, unless an express agreement that the goods should be sold to *Morgan* was proved. On the whole, I am of opinion that a new trial ought to be ordered.

Judgment, C.A., Baggallay, J.A.

BAGGALLAY, J.A.:—

I agree with the Lords Justices in thinking that the order of the Chief Judge should be discharged, and that a new trial should be directed.

If the relations between *Morgan* and his employers were simply those of agent and principal, it is clear that he could not, in the absence of special contract, make any profit beyond his commission out of the sales made by him, but if an arrangement was come to by which *Morgan*, without forfeiting his right to commission, was to be at liberty to become himself the purchaser at the price which Messrs. *Simpson & Co.* were willing to accept, taking upon himself the risk of profit or loss upon a re-sale, I am not aware of any rule of law or equity which would prevent effect being given to such an arrangement. As, however, such an arrangement would afford facilities for the perpetration of the grossest frauds, any Court would require the very clearest evidence of its existence before giving effect to it.

Now, it appears to me that, apart from the deed of August, 1869, there was a conflict of evidence as to the real nature of the contract between *Simpson & Co.* and *Morgan*, and that such evidence was properly submitted to the jury, unless both parties were conclusively bound by the recital in the deed. Such recital, however, if it was conclusively binding, was clear and distinct, and adverse to *Morgan's* claim.

The question, therefore, resolves itself into a consideration of the effect of the recital in the deed.

Now, *Morgan's* claim, though chiefly arising out of the transactions subsequent to the date of the deed, includes, as has been pointed out by the Lords Justices, commissions earned previously; and as to this portion of the claim, it appears to me that, although

the statements in the recital are strong evidence against *Morgan*, they ought not to be treated as conclusively binding upon him.

With respect, however, to the business transactions after the date of the deed, the case is different. As to these the recital is, I think, conclusive, unless it can be shewn either that the deed was executed under a mutual mistake, or that the parties subsequently agreed not to be bound by it.

As regards the suggestion of mutual mistake, I am of opinion that there was not any evidence in support of it to go to the jury, and, if the case of *Morgan* depended on this suggestion alone, I should concur in the view adopted by the Chief Judge. But, in the view which I take of the case, there was evidence before the jury which, if it was trustworthy, went to shew that, after the execution of the deed, both parties agreed to carry on, and did carry on, their business transactions otherwise than in accordance with its terms. Such evidence was contradicted by that of the witnesses on the other side, and the verdict of the jury was, in my opinion, very unsatisfactory. But it nevertheless appears to me that there was a question for the jury to deal with, and that the County Court Judge erred rather as regards the particular questions put by him to the jury than in taking the opinion of the jury upon the evidence submitted to them.

The question then arises whether, in such a case as the present, this Court should direct a new trial, or should disregard the verdict of the jury, and proceed finally to dispose of the matter, acting upon its own view of the evidence at present before it.

Now it has not been the practice of the Court of Chancery, by which practice that of the Court of Bankruptcy is regulated, to set aside the verdict of a jury without directing a new trial, unless the finding of the jury upon the evidence before it has become immaterial to the ultimate decision of the case, by reason either of the production of some additional evidence of a conclusive character, or of the application to the circumstances of the case of some recognised rule of law. The rules of practice embodied in this proposition are, in my opinion, clearly recognised in the cases of *Armstrong* v. *Armstrong* (1) and *Simpson* v. *Holliday* (2). In *Armstrong* v. *Armstrong* two issues had been

(1) 3 My. & K. 45. (2) Law Rep. 1 H. L. 315.

C. A. 1876

Ex parte MORGAN. *In re* SIMPSON.

Judgment, C.A., Baggallay, J.A.

directed, the one as to the existence of a partnership on certain terms regulating the payment of interest on capital advanced, the other as to the application of these terms to certain sums of money which had been advanced by one of the parties. On both issues the findings were in the affirmative, but it having been brought under the notice of the Court that the partnership was illegal, the verdict was disregarded, on the ground, not that it was wrong having regard to the evidence before the jury, but that it was immaterial. So also in *Simpson* v. *Holliday*, the Vice-Chancellor having tried the issues, which were the usual issues in a suit for infringing a patent, and found them in the affirmative, made a decree a few days later in favour of the Plaintiff, but on appeal the Lord Chancellor reversed the decree, on the ground that the patent was bad at law for want of a sufficient specification. He also reversed the findings on the issues. On a further appeal to the House of Lords, the order of the Lord Chancellor reversing the decree was affirmed, but it was declared that he had erred in reversing the findings. The same principle was recognised in the House of Lords in the recent well-known case of *Fernie* v. *Young* (1).

For these reasons I am of opinion that a new trial should be directed, and I concur in the views expressed by Lord Justice *Mellish* as to the nature of the questions which should be submitted to the jury, and as to the directions which should be given by the Judge.

Brett, J.

BRETT, J., after stating the facts and the arguments, continued:—

The first question to be determined seems to me to be, whether the trial before the jury in this case can properly be treated as a trial under sect. 72 of the *Bankruptcy Act*, 1869. The steps by which it was arrived at were, as pointed out by Mr. *Little*, an order for an issue, a settlement of the form of issue, and then, instead of an application to the County Court Judge founded upon a desire of both parties to have a certain question of fact tried by a jury rather than by the Court itself, or of an application on which the Court came to a judicial decision that there was a question of fact which ought to be tried by jury rather than by the Court itself,

(1) Law Rep. 1 H. L. 63. 12 Jur. N.S. 437.

C. A.
1876
Ex parte MORGAN.
In re SIMPSON.
Judgment, C.A., Brett, J.

there was a claim by the Plaintiff for a jury, and an order for a jury made upon and reciting such claim. This, it was said, was the course of proceeding in the County Court when exercising its common law jurisdiction, and was not a proceeding in bankruptcy under the statute. The County Court Judge, acting under sect. 72, ought to exercise a judicial discretion, founded on facts brought before him, whether it was expedient or not that the proposed question of fact should be tried by a jury. It seems to me that the proceedings were irregular, and that the contention of Mr. *Little* is right to a certain extent. Whether in a bankruptcy litigation the parties desire a question to be tried by jury, or an application for a trial by jury is made by either of them, the wording of the section is, that "the Court *may* direct such trial to be had." That phraseology indicates that the Court is to exercise a discretion. And as I agree further with Mr. *Little's* argument, that bankruptcy proceedings under the statute are proceedings in equity, I apprehend that the discretion as to granting or refusing an issue is to be exercised in the same way, and subject to the same appeal, as the discretion with regard to the same matter was exercised in the Court of Chancery. I think, therefore, that the parties were entitled to have an exercise of judicial discretion on this point, and that they had it not. But I think that the course taken was only irregular, and that such irregularity was so far waived by the appearance of the parties on the trial, that this Court may well treat the trial as one had under the 72nd section.

The next question seems to me to be, whether the whole proceeding as to the trial of a question of fact by a jury in a bankruptcy litigation, and as to an appeal in respect of any part of such proceeding, is to be treated in the same way, and subject to the same rules, as similar proceedings were treated in the Court of Chancery. As to the proceedings in the County Court and in the *London* Court of Bankruptcy, I think that sects. 59, 65, and 66 of the *Bankruptcy Act*, 1869, constitute such Courts, when they administer bankruptcy law, Courts having all the powers of the Court of Chancery. That is to say, they give them the power and jurisdiction, and thereby impose on them the duty, of administering the law as in equity. And sect. 71 gives the same power and jurisdiction to the Chief Judge sitting as a Court of Appeal; and

C. A. 1876 *Ex parte* MORGAN. *In re* SIMPSON. Judgment, C.A., Brett, J.

it seems to give to this Court even further power than to the others, for, whereas to the County Court and to the *London* Court of Bankruptcy the power as to ordering an issue seems to be confined by sect. 72 to an issue to try a question of fact by a jury before the Court, to this Court, by sect. 71, is given "all the powers and authorities of the Court of Chancery relative to the trial of questions of fact by jury, issue, or otherwise." I think that all questions as to the trial of issues of fact by a jury in bankruptcy are to be determined in the same way, both in the Courts of first instance and of Appeal, as similar questions arising in Chancery were treated in the Courts of first instance and of Appeal in Chancery.

Then arise the questions, what power has the Chief Judge in Bankruptcy, and has this Court of Appeal, in such a case as the present? The orders for an issue and for a trial by jury were made before any evidence had been produced, which was irregular, as appears from the judgment of *Turner*, L.J., in *Morrison* v. *Barrow* (1). If the evidence which has since been adduced had been brought forward before those orders were made, and if it is not sufficient to raise any substantial doubt, neither order ought to have been made. And if there had been an appeal against the orders, they should, upon the hypothesis, have been set aside, according to *Nicol* v. *Vaughan* (2), cited in *Daniell's* Chancery Practice (3). If upon the hearing after the trial it appear, either from some point of law or from some fact not comprised in the question of fact submitted to the jury, that, consistently with the finding of the jury in favour of one party the ultimate decision ought in point of law to be in favour of the other, the order on the hearing ought to be made in favour of the latter, notwithstanding the finding. This is the doctrine laid down in *Fernie* v. *Young* (4), and it was acted upon in a case where one of the issues was determined upon a point of law, and such determination was reversed in the Court of Appeal. The House of Lords, in *Simpson* v. *Holliday* (5) having come to the conclusion that such issue as properly decided as matter of law on appeal would, if properly de-

(1) 1 D. F. & J. 639.
(2) 2 Dowl. & C. 420; 1 My. & K. 253, 257.
(3) 5th Ed. p. 943.
(4) Law Rep. 1 H. L. 63.
(5) Ibid. 315.

cided below, have entitled the Appellant to a decree, notwithstanding that the other issues were to be assumed to have been properly found in favour of the Respondents, held that a decree might be made in the Court of Appeal in favour of the Appellants, without sending the issue back to be retried. And this seems to me to be also the effect of the decision in *Armstrong* v. *Armstrong* (1). Assuming the finding of the jury in favour of the Plaintiffs to be right in fact, the decision of the application in Chancery, it was determined, ought to be for the Defendants, and a decree in their favour was upheld. And so in *Morrison* v. *Barrow* (2), even though the agreement in dispute was made by a duly authorized agent of the Plaintiff, it was not an agreement of which specific performance would be decreed, and therefore a new trial was refused of the issue which had been found in favour of the agreement. A decree was made to set aside the verdict, with which the Court was not satisfied, and to dismiss the bill without further trial of the issue. If an issue has been properly directed upon a sufficient controversy of fact (as observed by *Turner*, L.J., in *Morrison* v. *Barrow*), and a jury has found upon it, and there has been a conflict of evidence upon it, and no leave has been reserved, neither the first Court nor the Court of Appeal can make an order or decree inconsistent with the findings of the jury, though satisfied that there was a misdirection which caused the miscarriage, or that the verdict was against the weight of evidence. The only remedy is a new trial. The reason is that in either case there is, after the verdict is set aside, still matter of controversy which another jury may not unreasonably find either way. This is decided by *Fulton* v. *Andrew* (3), as well as by *Fernie* v. *Young* (4) and *Simpson* v. *Holliday* (5). I cannot but think that the case of *Ex parte Norton* (6) is in conflict with the decisions in the House of Lords, and that it cannot be supported.

But next arises a point which to my mind is difficult. If there be an order for the trial of an issue by a jury, and a trial had, and evidence given, and a finding, but, upon a review of such finding by the Court, it appears that there was no evidence proper

(1) 3 My. & K. 43.
(2) 1 D. F. & J. 633.
(3) Law Rep. 7 H. L. 448.
(4) Law Rep. 1 H. L. 63.
(5) Ibid. 315.
(6) Ibid. 16 Eq. 397.

C. A. 1876

Ex parte MORGAN. *In re* SIMPSON.

Judgment, C.A., Brett, J.

to be left to the jury in support of the finding, can the Court set aside the finding, and make an order or decree, without sending the issue back to be tried? The distinction between the cases of a verdict being against the weight of evidence and of there being no evidence is known to be sometimes very fine, yet the difference is in effect great. If there is no evidence the Judge is bound to direct the jury, as matter of law, to find in a particular way, and the jury is bound to obey. The question whether there is or is not any evidence is a question of law to be decided by the Judge. If there be sufficient evidence for the jury, the Judge at the trial must accept their verdict, but still their decision may be so unsatisfactory as to entitle the Court to send the case to another jury. If several juries, however, find in the same way, the Courts have never persisted in setting aside consecutive verdicts. The question whether the verdict is against the weight of the evidence is a question of fact to be determined according to the discretion of the Court in Banc, *i.e.*, the Court of Appeal. In a Court of Law, where there was no evidence, and yet the Judge left the question to the jury, and they found as if there were evidence, there was a double miscarriage. The Judge in such case was guilty of misdirection, an error in law; the jury, of an error in fact. Yet the only remedy was a new trial. The reason was that the judgment of a Court of Law must be founded on a verdict, and, the first verdict being set aside, there could be no judgment until another verdict was returned. Whether this will be so under the new system need not now be determined. We are dealing with proceedings under the *Bankruptcy Act*, which refers to the system in Chancery. The question is whether a Court of Equity, which directed an issue in order to inform its conscience, but which had jurisdiction to give final judgment without such an issue, was bound to the same extent as a Court of Law. By the hypothesis the question had come to be only a question of law. The error was an error in law. There was no further real controversy legally possible. If there was no suggestion of further evidence, and if the case must be remitted for a finding, it must be remitted with a direction that the Judge was to direct the jury to find only in one way. If the facts thus disclosed had been before the Court originally, no issue would have been ordered; the find-

ing being set aside on such a ground, a further inquiry becomes futile. There seems to be no difference between the arising of a point of law which makes further inquiry futile and the arising of a point of law having the same effect, such as arose in *Simpson* v. *Holliday* (1).

That case seems to me to be an authority in favour of holding that in such case the Court of Chancery was not bound, and the Court of Bankruptcy is not bound, to send down again for trial an issue which has become futile. In such a case, therefore, I come to the conclusion, both upon principle and authority, that the Court of first instance or the Court of Appeal, when a motion in the form of a motion for a new trial is made to set aside the finding, and a further motion is made for an order or decree, may set aside the finding, and set aside or disregard the order for a jury in respect of the particular issue, and may set aside the issue, and may make an order or decree upon other facts or findings, without sending the particular issue back before a jury.

The remaining question, then, in this case, is, whether there was any evidence fit to be left to the jury in support of the issue submitted to them. [His Lordship then reviewed the evidence, and expressed his conclusion as follows:—]

It seems to me, therefore, that the verbal evidence of *Morgan*, so entirely inconsistent as it is with the true business meaning of the other documents and with the deed, was but a scintilla of evidence, or was evidence absolutely answered by, because inconsistent with, the documents, and that there was, therefore, no evidence in point of law in support of the second question. There was none, in my opinion, in support of the issue.

I therefore come to the conclusion that the decision of the Chief Judge was substantially correct, though I think it was incorrect in form, and though I cannot agree with all that is said in his judgment with respect to disregarding the findings of the jury. If his order is to be varied in point of form, I think it should stand thus—that the finding of the jury should be set aside on the ground that there was no evidence to support it; that the issue and order for trial by a jury should be set aside, because it had become immaterial to try any question of fact by a jury; and that the order

(1) Law Rep. 1 H. L. 315.

C. A. 1876

Ex parte MORGAN. *In re* SIMPSON.

of the County Court Judge should be set aside, and *Morgan's* proof should be admitted for the smaller sum.

THE COURT discharged the order of the Chief Judge, and ordered that a new trial should be had.

Solicitors for Appellant: *Pritchard, Englefield, & Co.*, agents for *Boote & Edgar, Manchester.*

Solicitors for Trustee: *Phelps & Sidgwick*, agents for *Sale, Seddon, & Co., Manchester.*

In re STOCKTON MALLEABLE IRON COMPANY.

M. R.
1875
Dec. 9.

Company—Articles of Association—Lien on Shares—Power to refuse Transfer—"Due"—"Indebted."

By the articles of association of a company it was provided (Art. 7) that the company should have a first and paramount lien upon all shares of any member for any money due to the company from him alone or jointly with any other person, with power to sell the shares and apply the proceeds in or towards discharge of such debts; and (Art. 16) that the company might decline to register any transfer of shares whilst the member making the transfer was, either alone or jointly with any other person, indebted to the company on any account whatever:—

Held, that the 7th and 16th articles related to the same subject-matter, and that the company could only refuse under Art. 16 to register a transfer in cases where they were entitled to a lien under the 7th article.

Held, also, that the word "due" in the 7th article meant due and payable; and that the word "indebted" in the 16th article had a similar signification.

96 RP 437
438
2 Ch D 58

Statement.

THIS was an application by *Thomas Chapman* and *Frederick Joseph Edlmann*, under sect. 35 of the *Companies Act*, 1862, asking that the register of shareholders of the *Stockton Malleable Iron Company, Limited*, might be rectified by erasing the name of *James Shaw* and substituting the names of the applicants as the joint owners of certain shares.

The company was registered under the *Companies Act*, 1862. The articles of association contained the following clauses:—

"7. The company shall have a first and paramount lien upon all shares of any member for any moneys due to the company from him alone or jointly with any other person, and where a share is held by more persons than one the company shall have a lien thereon in respect of all moneys due from all or any holders thereof, and the company may absolutely sell and dispose of any of the shares registered in the books of the company in the name of such debtor, either solely or jointly with any other person, and apply the proceeds, so far as the same may go, in discharging such debts; and upon such sale they shall, without any further or other consent of the sole owner or joint owners of such share, transfer the same in the books of the company to the purchaser thereof."

"16. The company may decline to register any transfer of

M. R. 1875 *In re* STOCKTON MALLEABLE IRON COMPANY.

shares whilst the member making the transfer is, either alone or jointly with any other person, indebted to the company on any account whatever."

Statement.

Shaw, being the registered owner of the shares in question, duly executed a transfer thereof to the applicants, who forwarded it to the company for registration. At the time when the transfer reached the company's office the company were the indorsees and holders for value of a bill of exchange accepted by *Shaw*, but which had not arrived at maturity. The company declined to register the transfer on the ground that *Shaw* was indebted to the company within the meaning of the 16th of the articles of association.

Argument.

Chitty, Q.C., and *Dundas Gardiner*, for the applicants.

Davey, Q.C., and *Langworthy*, for the company :—

The case is governed by *In re London, Birmingham, and South Staffordshire Banking Company* (1). The acceptor of a bill of exchange is the debtor of the holder. There is certainly a debt due from the acceptor to the drawer of a bill; and the indorsement is an assignment of the debt. It is *debitum in præsenti, solvendum in futuro.* As against a *bonâ fide* holder, the drawer and acceptor cannot dispute the debt. The claim of the company on the bill would be proveable in bankruptcy, and would support a petition for adjudication: *Macartney* v. *Barrow* (2); *Robson* on Bankruptcy (3); *Ex parte Hayward* (4); *Ex parte Douthat* (5); *Brett* v. *Levett* (6); *Ex parte Sturt & Co.* (7); *Ex parte Kemp* (8); *Byles* on Bills (9).

Judgment.

JESSEL, M.R. :—

This case appears to me very plain. I have to construe two articles of association of this company—the 7th and the 16th. It appears to me that the 16th is a mere supplement to the 7th, that

(1) 34 Beav. 332. (5) 4 B. & A. 67.
(2) 7 East, 437, n. (6) 13 East, 213.
(3) 2nd Ed. p. 158. (7) Law Rep. 13 Eq. 309.
(4) Law Rep. 6 Ch. 546. (8) Ibid. 9 Ch. 383.
(9) 9th Ed. pp. 1, 3.

M. R.
1875
In re
STOCKTON MALLEABLE IRON COMPANY.
Judgment.

is, they refer to the same thing. It is not to be supposed, as far as I can see, that they are independent articles in the sense that the members whose shares can be dealt with under the 7th are different from the members whose shares can be dealt with under the 16th. It would be monstrous if it were so. It appears to me that the 16th is a security for the 7th, so to say.

On the 7th article the argument addressed to me was this. It was said "moneys due" included moneys owing, but not at present payable. To that I answer, adopting the criticism of Lord Justice *Mellish* in *Ex parte Kemp* (1) on the words in the *Bankruptcy Act*, that the word "due" may mean either owing or payable, and what it means is determined by the context. Now there is a context here which, to my mind, puts the thing out of all argument whatever. [His Lordship read the 7th article.]

It is absurd to suppose that the company may sell the shares of a man, and apply the proceeds in payment of a bill of exchange which he has given, but which is not yet due, that is not yet payable; for that must be the meaning of the word "due" in that article. In the 7th article, then, the word "due" means payable, and the words "such debtor" mean a man who owes a debt presently payable; and that is the meaning of the article. Then, as I read the 16th article, it is that they may decline to register that for which they have a lien under the 7th article. The 16th article says they may decline to register any transfer of shares by a man who is indebted to them. Why may they decline to register? Because they have a lien. That seems to me the only reason why they may decline to register. It is against the interest of companies to fetter transfers. The more free the companies make the transfers the better for them, and the better for their shareholders, and therefore the only object of fettering the transfer is to secure the lien of the company. But is it reasonable to suppose the company intend to fetter a transfer when they have no lien?

Besides, the word in the 16th section is "indebted." Now I find the words "debtor" and "debt" used in the 7th article in the sense I have mentioned; and I do not think the word "indebted" is to have a different meaning in the 16th article. I am satisfied that, according to the true construction of these articles, it was not

(1) Law Rep. 9 Ch. 383.

M. R. 1875 *In re* Stockton Malleable Iron Company. Judgment.

intended to give to the directors the power they claim, even assuming that the other argument addressed to me, as to which I say nothing, is well founded, that the term "indebted to them" could be properly applied in any case to a man who was a mere acceptor of a bill of exchange. I do not think myself that is the proper mode of describing such a relation, but I do not say that you might not with a context shew that that was the meaning of the words. On these grounds, therefore, I decide in favour of the motion.

Solicitors: *Travers Smith & Co.; Cree*, agent for *Newby & Co*, *Stockton.*

M. R. 1876 *Jan.* 15.

MIDDLETON *v.* POLLOCK.

[1873 M. 204.]

Ex parte ELLIOTT.

Administration—Insolvent Estate—Preference of Creditors—Declaration of Trust—Non-communication to Cestui que Trust—13 *Eliz.* c. 5.

The creditor of an insolvent debtor, who dies without having been adjudicated bankrupt, is entitled to the benefit of any payment or security made or given by the debtor, although such payment or security would in case of bankruptcy have been set aside as a fraudulent preference.

E. placed in the hands of her solicitor a sum of money for investment. He died insolvent without investing the money, and after his death there was found in the safe at his office a memorandum dated a fortnight before his death, the contents of which had not been communicated to *E.* By this memorandum, the solicitor declared himself trustee of certain leaseholds then in mortgage to himself, and of a bill which he had indorsed to *E.*, to secure the repayment of the sum placed in his hands. In a creditor's suit for the administration of the solicitor's estate:—

Held, that, even if the solicitor executed the memorandum with the knowledge of his insolvency, still *E.* was entitled to the benefit of the security as against the other creditors; for, as the solicitor retained no benefit for himself, the gift was *bonâ fide* within 13 Eliz. c. 5.

Statement.

THIS was a creditor's suit for the administration of the estate of *Alfred Atkinson Pollock*, a solicitor.

Pollock was in the habit of receiving moneys for investment from numerous clients; and his practice was to pay moneys so received

into a common fund, and pay interest to each client after the rate agreed on, taking the security in most cases in his own name.

One of his clients was a relative, Miss *Mary Josephine Elliott*, who had put into his hands a sum of £1110 for investment. He never invested this sum on any security, but on the 24th of July, 1873, he signed a memorandum, by which, after reciting (as the fact was) that certain leaseholds at *Eltham* were mortgaged to him, with other premises, to secure a large aggregate sum then due to him by *Gates Brothers*, who had that day accepted a bill of exchange payable on demand, drawn by him on them for £1182 18*s.* 8*d.*, part of such aggregate sum, and that the sum of £1182 18*s.* 8*d.* had been placed in his hands by Miss *Elliott* for investment at interest, and he had arranged to invest the same on the security of the bill of exchange, and upon a mortgage to be executed to Miss *Elliott* of the leaseholds, and had accordingly indorsed to her the bill of exchange, *Pollock* declared that, until completion of the intended mortgage, he would be and remain a trustee for Miss *Elliott* of the leaseholds to secure the repayment to her of the sum of £1182 18*s.* 8*d.*, and interest at £5 per cent. per annum.

The difference between the sums of £1182 18*s.* 8*d.* and £1110 was taken to represent interest accrued on the latter sum.

Pollock, who died on the 10th of August, 1873, did not communicate to Miss *Elliott* the fact of his having indorsed to her the bill of exchange and executed the declaration of trust. After his decease, the bill of exchange and declaration of trust were found in an envelope indorsed "Miss *J. Elliott*, security for £1182 18*s.* 8*d.* and interest at 5 per cent," in a safe at his office, where it had been placed by his confidential clerk, with a number of similar declarations of trust of the same date, and bills indorsed in favour of sixteen other clients, most of whom, like Miss *Elliott*, were relatives of *Pollock*.

Pollock's affairs had been investigated by an accountant, who deposed that on the day of his death his assets amounted to £566,680, and his liabilities to £411,738. But a large portion of his assets was represented by advances to insolvent builders and unsuccessful limited companies; and it was admitted that he had been insolvent for some time prior to his death, although it was not shewn that he knew it.

M. R. 1876 — MIDDLETON v. POLLOCK. — *Ex parte* ELLIOTT.

In order to raise the question whether the creditors whom *Pollock* had preferred in this manner were entitled to the benefit of the preference, as against his unsecured creditors, a summons was taken out on behalf of Miss *Elliott*, asking for the delivery of the declaration of trust and bill of exchange; and this summons was now adjourned into Court as a representative case.

Argument.

Chitty, Q.C., and *H. Burton Buckley*, for Miss *Elliott*, were stopped.

Fry, Q.C., and *Romer*, for the Plaintiff:—

This attempt of an insolvent to distribute the bulk of his available assets among a few selected creditors cannot be supported. We admit that the doctrine of fraudulent preference has no application, there being no bankruptcy: *Alton* v. *Harrison* (1). But under the statute of *Elizabeth* (13 Eliz. c. 5), a gift, to be good as against creditors, must not only be made on good consideration, as this gift was, but also *bonâ fide*, which this gift was not: *Twyne's Case* (2). A gift is not *bonâ fide* within the statute that has for its object the preferring of a few favoured creditors in the event of the debtor's insolvency; for good faith requires that he shall do no such thing. *Pollock* must have known the state of his affairs, and the secrecy of the transaction, enabling him, as it might have done, to dispose of the securities otherwise if it suited his purpose, is proof that it was not *bonâ fide*.

W. Barber, for the Defendant.

Judgment.

JESSEL, M.R.:—

I am of opinion that the applicant is entitled to succeed. She had put into the hands of Mr. *Pollock* a sum of £1110 for investment. Mr. *Pollock*, in addition to his business as a solicitor, carried on the business of a scrivener, and was in the habit of taking from his clients, including Miss *Elliott*, sums for investment. He also had in his hands a sum of £70 odd belonging to her, apparently for interest, making a total of £1182 18*s.* 8*d.* On the 24th of July, 1873, he being then, as it is alleged and proved,

(1) Law Rep. 4 Ch. 622. (2) 2 Rep. 80 b.

in insolvent circumstances to a very great extent (though whether or not he knew it may possibly admit of argument, my own impression being that he did know it), assigned to various clients, including Miss *Elliott*, certain securities in his own name, and executed declarations of trust in favour of those clients. This selected body of clients consists, to a considerable extent, of his relatives. Miss *Elliott* is a relative, others are friends, and the reason for the selection of these others does not so clearly appear.

Of course, considering the state of his affairs, a very great number of clients who had entrusted him with money for investment in the same way were left wholly unprovided for. The form of the securities in this case is very plain. There was a sum of £1182 18*s.* 8*d.*, the sum that had been entrusted to him to invest, due to Mr. *Pollock* from Messrs. *Gates*, secured by a bill of exchange on demand drawn on them by Mr. *Pollock*, and further secured also by a mortgage from Messrs. *Gates* to Mr. *Pollock* on some leasehold property. He indorsed the bill to Miss *Elliott*, and he executed a declaration of trust of the leasehold premises. He then put the declaration of trust, the bill, and the title deeds, in an envelope indorsed "Miss *J. Elliott*, security for £1182 18*s.* 8*d.*, with interest at 5 per cent. per annum," and handed the documents in the envelope to his clerk to put them in his safe. He died a fortnight afterwards, and it does not appear that he communicated to Miss *Elliott* what he had done. The claim is, on the face of it, as binding on Mr. *Pollock's* estate as anything can be. He had the money for the purpose of investment. He said he was going to invest it, and he did so, and the property stands as a security for it. As between him or his legal personal representative and Miss *Elliott*, I believe nothing could be said, at all events nothing has been said. But there are other clients who were also creditors, and had given their money to Mr. *Pollock* to invest, but who are unable to trace the actual sums of money, because Mr. *Pollock's* habit was to mix them with his own moneys and the moneys of other clients which were not given him to invest, and which were paid into various bankers at different times in such a way that nobody could trace anything. It was obvious that Mr. *Pollock* at this time of insolvency executed securities in favour of a selected body of clients to the

M. R.
1876
MIDDLETON v. POLLOCK.
Ex parte ELLIOTT.
Judgment.

exclusion of the rest, who say that the securities so made are not to be treated as securities at all, because they were fraudulent and void under the provisions of the well-known statute of the 13th of Queen *Elizabeth*.

Now, it is clear that, in order to make the securities void on that ground, it must be shewn that they were not given for good consideration, and *bonâ fide*. It is not disputed before me, nor could it have been disputed, that there was good consideration. The whole of the sums in question represented either money deposited in Mr. *Pollock's* hands, or money due from him to that amount. Therefore the argument was confined to the question of *bona fides*.

The first argument was that Mr. *Pollock* intended to give a preference to his selected body of clients, that is, to give them a valid security against his property, but to give that valid security as a preferential payment or security. As between these preferred clients and the rest of his clients, whatever may be the morality of the case, as far as I know, there is no law which prevents a man in insolvent circumstances from preferring one of his creditors to another, except the bankruptcy law. Under the bankruptcy law, no doubt a man in insolvent circumstances is not entitled, without pressure, at all events, to pay one creditor and to leave the other creditors unpaid. But Mr. *Pollock* was not a bankrupt, and the bankruptcy law has no application to him. It has been decided, if decision were wanted, that a payment is *bonâ fide* within the meaning of the statute of *Elizabeth*, although the man who made the payment was insolvent at the time to his own knowledge, and even although the creditors who accepted the money knew it. Therefore, the mere fact of the deliberate intention of Mr. *Pollock*, if he entertained that deliberate intention, of preferring, in case of insolvency, this selected list of clients to the others, would not be sufficient to avoid this claim. Assuming, therefore, that it had been proved not only that he was insolvent, but also that he was insolvent to his own knowledge, I think that, looking at the words of the statute and the authorities, the payment was *bonâ fide* if it was intended to be a payment, and the security was *bonâ fide* if it was intended to be a security. The meaning of the statute is that the debtor must not retain a benefit

M. R.
1876
MIDDLETON v. POLLOCK.
Ex parte ELLIOTT.
Judgment.

for himself. It has no regard whatever to the question of preference or priority amongst the creditors of the debtor. That, I think, disposes of the first argument.

The second argument was wholly founded on the statute. It was said that if Mr. *Pollock* did not intend the creditors to have the security at all, but did intend nothing more than this, that he was to have the absolute disposal of the property in his own hands as it was before, that was not *bonâ fide* within the statute. But that assumes the case to be exactly the contrary of the view which was presented to me by the first argument, because it is impossible to suppose that the securities were made and given to the clerk except with the view of preferring Mr. *Pollock's* selected clients, and he could not prefer them unless he made a security. Therefore I think the second view is not the true view, but that the real object of Mr. *Pollock* was to make the best security possible, with a view probably of giving preference to these creditors in case his worst anticipations were realized. Consequently, I think it was intended by him that these securities should have the exact operation which the law would give them, and in that sense, therefore, they were *bonâ fide*. On these grounds I must allow the claim.

Solicitors: *Farrar, Ouvry, & Co.; Linklaters & Co.; Ridsdale, Craddock, & Ridsdale.*

WORRAKER *v.* PRYER.

M. R.
1876
Jan. 27.

[1876 W. 9.]

Practice—Judicature Acts—Creditor's Action for Administration of Real and Personal Estate—Action by Single Creditor—Indorsement of Writ—Rules of Court, 1875, *Order* XVI, *r.* 9, *Appendix A., Part II., s.* 1, *Form* 1.

In a creditor's action for the administration of the real estate of a deceased person (who has not devised the real estate to trustees with power to sell and give receipts), the Plaintiff must sue on behalf of all creditors.

Cooper v. *Blissett* (1) not followed.

Statement

THIS was a creditor's action for the administration of the real and personal estate of a testator who had not devised his real estate

(1) 1 Ch. D. 691.

M. R. 1876

WORRAKER v. PRYER.

upon trust for sale. The Plaintiff did not sue on behalf of himself "and all other creditors."

Argument.

Everitt, for the Plaintiff, called attention to the point, and submitted that it was no longer necessary for a Plaintiff in a creditor's suit, who desired to have administration of the real estate, to sue on behalf of himself and all other creditors. He referred to Rules of Court, 1875, Order XVI., rule 9, Appendix A., Part II., sect. 1, Form 1; *Cooper* v. *Blissett* (1); *Wooldridge* v. *Norris* (2).

Chubb, for the Defendants.

Judgment.

JESSEL, M.R.:—

Under the old practice, the Court required all parties interested to be present; but where the parties were too numerous, it allowed one member of the class to sue on behalf of the rest. That was the theory of creditors' suits; and no change was made in it till the passing of the *Improvement of Jurisdiction of Equity Act* (15 & 16 Vict. c. 86), by the 42nd, 46th, and 47th sections of which certain changes were made in this respect. That Act, however, went no further than this, that it enabled a creditor to obtain on summons an order for the administration of the real estate of a deceased person, where the whole of the real estate was devised to trustees who had power to sell and give receipts; in other cases the old practice remained unchanged. It is said that it was decided by Vice-Chancellor *Giffard*, in *Wooldridge* v. *Norris*, that it was unnecessary to file a bill on behalf of all the creditors in order to obtain administration of the real estate; but it does not appear to me that he did so decide. In the first place, there was in that case (as the Vice-Chancellor observed in his judgment) an express trust in the testator's will to pay the debt; and in the next place, it was a decision on a demurrer, and all that the Vice-Chancellor said was that he would not in any case have allowed the objection to prevail, which may have meant that he would give liberty to amend. On the other hand, in *Ponsford* v. *Hartley* (3), Lord *Hatherley*, when Vice-Chancellor, allowed a demurrer to a bill by a

(1) 1 Ch. D. 691. (2) Law Rep. 6 Eq. 410.
(3) 2 J. & H. 736.

creditor for administration of real estate, on the ground that the suit was not on behalf of all creditors. It seems to me, therefore, that the old practice was clearly established; and, to my regret, I find nothing in the new orders to alter it. The good sense of the matter is entirely in accordance with the view of Vice-Chancellor *Hall* in *Cooper* v. *Blissett* (1); but the rule is express, that, where no other provision is made by the Orders, the old procedure and practice remain. The writ had better be amended by making the Plaintiff sue on behalf of himself and all other creditors.

M. R. 1876 WORRALL v. PRYER. Judgment.

Solicitor: *Digby.*

COOK *v.* ENCHMARCH.

M. R. 1876 Feb. 4.

[1876 C. 43.]

Practice—Action for Recovery of Land—Joinder of other Causes of Action—Rules of Court, 1875, *Order* XVII., *r.* 2.

Leave will be given under Rules of Court, 1875, Order XVII., rule 2, to join with an action for the recovery of land an action for the recovery or delivery up of a deed relating to the land: also for the recovery of personal estate comprised in the same instrument.

STIRLING applied, under Rules of Court, 1875, Order XVII., rule 2, for leave to join in one writ claims for, 1, recovery of possession of land; 2, an injunction to restrain one of the Defendants from receiving the rents of the land; 3, the appointment of a receiver; and, 4, delivery up and cancellation of a deed under which the said Defendant claimed to be entitled to the land sought to be recovered. Statement.

JESSEL, M.R.:— Judgment.

You may take leave. In substance you wish to join with an action for the recovery of land an action for the recovery of a deed relating to the land. It may be well that it should be known that another case in which leave will be given is where it is sought to recover real and personal estate comprised in the same instrument.

Solicitors: *H. F. & E. Chester.*

(1) 1 Ch. D. 691.

M. R.
1876
Feb. 7.

HODGES *v.* HODGES.

[1875 H. 49A.]

Practice—Time to deliver Defence—Extension of Time—Demurrer—Rules of Court, 1875, *Order* XXVIII., *r.* 3; *Order* XXII., *r.* 1.

A Defendant who has obtained an order extending the time within which to "deliver his defence" may demur within such extended time.

Statement.

THE statement of claim in this action was delivered on the 6th of January, 1876, the writ having been issued in December, 1875. The Defendant appeared and obtained an order giving him until the 22nd of January to "deliver his defence." After the 14th and before the 22nd of January he demurred. The demurrer now came on for argument.

Argument.

Pope, for the Plaintiff, took a preliminary objection that the demurrer was too late. By Order XXVIII., rule 3, of the Rules of Court, 1875, a demurrer is to be delivered within the same time as any other pleading in the action. By Order XXII., rule 1, "When a statement of claim is delivered to a defendant he shall deliver his defence within eight days from the delivery of the statement of claim;" consequently the demurrer ought to have been delivered not later than the 14th of January. It was true that the Defendant had obtained under the same rule an extension of time within which to "deliver his defence:" but the "defence" to be delivered must be limited (as in the rule cited) to a statement of defence. To allow a demurrer to be put in would prejudice the Plaintiff by creating delay.

Chitty, Q.C., and *W. Barber*, for the Defendant, were not called upon.

Judgment.

JESSEL, M.R.:—

The Defendant has obtained an order of Court extending the time until the 22nd of January within which to "deliver his defence;" that means, in my opinion, any kind of defence. A demurrer is a mode of defence, and may be put in under that

order. If the Plaintiff wished to prevent the Defendant from demurring, he should have taken care that the order was made in form similar to that used under the old practice, which was to the effect that the Defendant should have so many days to answer, plead, or demur, not demurring alone. I must, therefore, disallow the preliminary objection.

M. R. 1876 HODGES v. HODGES.

Solicitors: *A. Clark; T. White & Sons.*

MALMESBURY RAILWAY COMPANY *v.* BUDD.

M. R. 1876 Feb. 4.

[1876 M. 49.]

Arbitrator—Disqualification—Jurisdiction—Injunction.

Semble, the Court has jurisdiction, by analogy to a writ of prohibition, to restrain by injunction an arbitrator from proceeding with a reference on the ground of corruption.

THIS action was brought by the Plaintiff company against Messrs. *Budd & Holt*, who were contractors, and the third Defendant, who had been appointed under an indenture made between the Plaintiff company and *Budd & Holt*, to determine what amount was payable by the company in respect of a claim made against them by *Budd & Holt*.

Statement.

The Plaintiff company claimed that it might be declared that the Defendant, the arbitrator, had become and was disqualified from and incapable of being or acting as arbitrator under the said indenture, and that he might be restrained by injunction from so acting, or attempting or purporting so to act.

On the 4th of February a motion was made on behalf of the Plaintiff company for an interim injunction to restrain the arbitrator from proceeding with the reference, when it was, among other things, alleged that he had advanced a considerable sum to *Budd & Holt*, which might be supposed to give him an interest in making an award in their favour. The case of *Pickering* v. *Cape Town Railway Company* (1) was referred to.

(1) Law Rep. 1 Eq. 84.

M. R. 1876

MALMESBURY RAILWAY COMPANY v. BUDD.

JESSEL, M.R., made an order for an interim injunction till the next motion day, on the usual undertaking.

Feb. 11. The case now came before the Court on two motions, one on behalf of *Budd & Holt* to discharge the order, and the other on behalf of the Plaintiff company to continue it; but after the case was opened, all imputation against the arbitrator having been disclaimed at the Bar, he, by his counsel, expressed his willingness to retire if the Court thought that it was desirable for him to do so.

Chitty, Q.C., *Cookson*, Q.C., and *Rawlins*, for the Plaintiff company.

Marten, Q.C., and *Blakesley*, for *Holt & Budd.*

Waller, Q.C., and *Macnaghten*, for the arbitrator.

Judgment.

JESSEL, M.R., made the following order:—

The Court being of opinion that there is no imputation whatever on the honour of the arbitrator, but he expressing himself willing to retire if the Court is of opinion that it is desirable that he should do so, and the Court being of that opinion, he retires accordingly, and is to be allowed his costs of the action as between solicitor and client, and also any costs due to him as arbitrator; all proceedings in the action to be stayed except for the purpose of this order; refer it to Chambers to appoint an arbitrator or arbitrators.

11 QBD 83

His Lordship added the following observations:—

On the question of jurisdiction, I think the Court must have jurisdiction to grant an injunction in such a case as this. It stands in this way: No doubt there is jurisdiction in the Court to set aside an award on the ground of corruption in the arbitrator, but if corruption is proved beforehand, so that the arbitrator is unfit to sit, it appears to me that, by analogy to the writ of prohibition which goes to inferior Courts to prevent a Judge who is incompetent to decide from deciding the case, there must be a similar jurisdiction to prevent the throwing away of the expense and trouble, to say nothing of the delay, involved in going on with an arbitration before an arbitrator who has no power of

M. R.
1876
MALMESBURY RAILWAY COMPANY v. BUDD.
Judgment.

deciding the case. I should not, therefore, assume jurisdiction at all—it would be simply carrying out the well-known jurisdiction formerly exercised by the Courts of Equity, but which is now transferred to the High Court, to restrain that from being done which, if done, could do no good to anybody, but would cause an immense amount of mischief in the shape of delay, expense, and trouble. I think, therefore, there must have been jurisdiction to entertain the action. I am very glad to find there is no foundation for it in fact, so that the ultimate decision on the question of law is not prejudiced by the facts.

Solicitors for Plaintiff Company: *Bolton, Robbins, & Busk,* agents for *Jones & Forrester, Malmesbury.*

Solicitors for Defendants: *Hargrove, Fowler, & Blunt.*

PEEK *v.* TRINSMARAN IRON COMPANY.

M. R.
1876
Feb. 11.

[1876 P. 29.]

Foreclosure—Action by Debenture Holder against a Mining Company—Interim Appointment of Manager—Jurisdiction.

In an action by debenture holders of a mining company against the company for foreclosure the Court has jurisdiction to make an interim order for the appointment of a manager.

Statement.

THE Plaintiffs were the holders of debenture bonds issued under the seal of a mining company, whereby all the real and personal estate, assets, plant, machinery, and effects of the company were charged with the amounts secured by the bonds. The action was brought for the usual mortgagees' accounts against the company, and for foreclosure.

Argument.

Northmore Lawrence now moved, on behalf of the Plaintiffs, for the appointment of a receiver and manager. He referred to *Fripp* v. *Bridgewater and Taunton Canal, &c., Company* (1), but admitted

(1) 11 Hare, 241.

M. R. 1876 PEEK v. TRINSMARAN IRON COMPANY. Judgment.

that there was no direct authority as to the jurisdiction of the Court to appoint a manager on an interlocutory application.

Woodhouse, for the Defendant company.

JESSEL, M.R.:—

I am of opinion that the Plaintiffs are entitled to the benefit of their security, and are entitled to secure the property in the only way in which it can be made secure, as otherwise it may go to ruin. I know of no authority bearing on the question, but on principle I consider that they are entitled to have a manager appointed.

Solicitors: *Carr, Bannister, Davidson, & Morriss.*

M. R. 1876 *Feb.* 12.

In re ST. THOMAS' DOCK COMPANY.

Company—Winding-up—Creditors' Petition—Discretion of Court—Petition directed to stand over—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 80, 86, 91.

11 C.L.D. 378
2 C.L.D. 169
7 T.L.
24 C.L.D. 264

A company was formed to repair and work a floating dock in the *West Indies*. The dock was not finished until December, 1875. At that time the whole capital of the company had been paid up in full, and debentures issued to the amount of £89,000, secured by a charge on the dock and certain concessions, constituting the only assets of the company. The interest on these debentures having fallen into arrear, a holder of a small amount served in December, 1875, the statutory notice to pay the interest, and then presented a petition to wind up the company. The petition was opposed by the company, by debenture holders to the amount of upwards of £70,000, and by the principal unsecured creditor, whose debt amounted to £5000; and there was no evidence that the sale of the dock and concessions would produce any surplus beyond the amount of the debentures:—

Held, that the petition must stand over for six months, upon the company undertaking not to consent to a winding-up order on another petition, or to wind up voluntarily, to give the Petitioner notice of the presentation of any other petition, and not to raise any objection to the petition being brought on in case any other petition should be presented.

Statement.

THIS was a petition to wind up the *St. Thomas' Dock Company, Limited*, by *Augustus Kempson*, who claimed to be a creditor for

£77 9*s.* 6*d.* for arrears of interest on principal moneys lent by him to the company. The Petitioner had served the statutory notice on the company, but had not been paid.

Statement.

The company was formed and registered in May, 1869, for the purpose of repairing and working an intended floating dock at the Island of *St. Thomas*, in the *West Indies*, which had been constructed for and belonged to another company then in liquidation. The dock was not completed until December, 1875.

The capital of the company was all paid up, and further funds had been borrowed on debentures. Of these debentures there had been two issues; the first issue, to the amount of £55,000, was secured by an assignment by way of mortgage of the dock and certain concessions, which constituted the entire assets of the company, the second issue, to the amount of £34,178, was secured by a charge on the assets of the company.

The Petitioner held three debentures of the first issue for sums amounting to £200, and one of the second for the sum of £200, and his debt consisted of the interest which accrued due on the 30th of June, 1875, on these debentures.

No part of the principal would become due upon any debenture until May, 1879; nor would any further interest become due until the 30th of June, 1876.

The company were indebted to one unsecured creditor to the extent of about £5000, and to other unsecured creditors to the further amount of between £2000 and £3000. There was evidence tending to shew that in two years the company would raise sufficient to pay all the interest on the debentures accrued up to that time.

Argument.

Roxburgh, Q.C., and *Bush*, for the Petitioner.

Davey, Q.C., and *Grosvenor Woods*, for the company and for the holders of debentures of the first issue to the extent of £43,956, and of the second issue to the extent of £28,845, opposed the petition, and asked that the petition might stand over in order that the company might have a fair opportunity of working the dock.

Whitehorne, for the principal unsecured creditor, also opposed

M. R. 1876

In re St. Thomas' Dock Company.

the petition, and referred to *In re Brighton Hotel Company* (1); *In re Western of Canada Oil, Lands, and Works Company* (2).

Roxburgh, in reply, insisted that an order should be made. The Petitioner's debt had been due for six months, and there was no prospect of paying anything for two years.

Judgment.

JESSEL, M.R.:—

If I had known the facts I certainly should not have called upon the Respondents, because I have a very strong impression that this is not a *bonâ fide* petition. The object of a creditors' petition to wind up is to get paid; a creditors' petition ought to be presented with no other object. Now, what is the position of the company? They have not a shilling in the world (as was put by the Petitioner's counsel and not contradicted on the other side), except a dock with some concessions. The dock and concessions are vested in trustees upon trust for the debenture holders, who have a first charge upon them, and subject thereto there is a charge upon the same property of the company in favour of other debenture holders, who have a second charge thereon. It is not alleged, or suggested, that the sale of this dock would produce more than sufficient, or would produce sufficient, to pay the debenture holders in full; and if that is so, no money can be obtained by a winding-up order. The only effect of the winding-up order would be to order a sale of the dock subject to these charges; there is no pretence that the sale would produce any surplus; therefore a winding-up order would not help the Petitioner, he would get nothing under it at all; and I may mention that the Petitioner has a debenture of £200 in the first class, and a debenture of a like amount in the second class, and, therefore, his interest in the dock, such as it is, would not be affected by the winding-up order. The petition may be *bonâ fide* in another sense, that is, it may not be presented maliciously or with an improper motive; it may be, and probably is, presented with the idea of getting paid, not of getting paid under the winding-up order, but of getting paid by reason of the company not daring to meet the threat or risk of being wound up, which is, I will not say, an ille-

(1) Law Rep. 6 Eq. 337. (2) Law Rep. 17 Eq. 1.

gitimate use, but not the primary use of a petition for winding up the company. On the other hand, I agree that it is *ex debito justitiæ*, using the words of Lord *Selborne*, by which I should be bound if I did not agree (for it is a decision of a Lord Chancellor) in the case of the *Western of Canada Oil, Lands, and Works Company*, and he only agreed with an expression of opinion in the House of Lords by Lord *Cranworth*. He says (1): "I entirely agree with the doctrine of Lord *Cranworth*—that if a creditor cannot get paid without winding up, it is *ex debito justitiæ* that he should have a winding-up order,"—that means when he can get something under the winding-up. It is not that he cannot get paid without, in the sense that he cannot get paid with either, but it is that he cannot get paid without, and there is some chance of getting paid with. That is the meaning of the sentence as I understand it. Then he goes on to say: "But so far am I from thinking that it would be a certain consequence of delaying this case until November that the creditors would be denied payment, that I think there is at least a fair, possible, and reasonable chance of their getting paid by means of that delay very much earlier than they would be under a winding-up order." He is, therefore, looking at a case where there were assets of the company which might by possibility be made available under the winding-up order, not to a case where there were no assets which could be made available, because, as I said before, it is not suggested for a moment that the sale of the dock, which is all he could have, would improve the Petitioner's prospect of payment. I do not remember such a case as this, where there are positively no assets that can be obtained by a winding-up order at all (if I make it); not even sufficient to pay the costs of it. The whole of the property of the company (there is not a shilling of unpaid capital or uncalled capital) consists of the dock and concessions, and the whole is subject to a mortgage exceeding its value. I understand that to be the effect of the evidence; there is, therefore, no probability of getting anything.

Then, why am I to make a winding-up order, the effect of which will be merely to embarrass the company? because that is what I am asked to do. On the other hand, the 91st section says this:

(1) Law Rep. 17 Eq. 6.

M. R. 1876 *In re* St. Thomas' Dock Company. Judgment.

"The Court may, as to all matters relating to the winding-up, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence." Now this is a creditors' question. The creditors are of two classes, the class of secured creditors, to which the Petitioner belongs, and the class of unsecured creditors, the class to which the *Colonial Bank*, represented by Mr. *Whitehorne*, belongs. Stating it roughly, there are creditors to the amount of about £89,000 secured, and of about £7000 or £8000 unsecured. Of the secured creditors the first class of debenture holders consist of £55,000. The Petitioner holds £200 worth, and stands alone. £43,956 is represented by debenture holders, who instruct Mr. *Davey* and Mr. *Grosvenor Woods* to oppose the petition, consequently there is £15,000 unaccounted for out of £55,000, £200 being one way and nearly £44,000 the other. As to the second issue, which take the next charge on the property, they stand in this way: £34,178 is the total amount, the Petitioner has £200 again, and £28,845 is represented by debenture holders, who again instruct the same counsel to oppose the petition; in other words, there is only £5000 out of the £34,000 unrepresented, and whose wishes I have no means of ascertaining. We have no occasion to call a meeting in such a case, because the opinion of the creditors is manifest.

I now go to the only other class who could hope to get anything by a winding-up order, because the secured creditors could get no more than their security. Whatever that is they will get, and get without a winding-up order, but the unsecured creditors could only get something more by a supposed surplus under the winding-up order. Out of £7000 or £8000 a creditor for £5000 appears, and there is reason to suppose that it is difficult to get the others represented, seeing what sort of creditors they are, but £5000 is represented out of £7000 or £8000, the others not appearing. The result is, therefore, as regards the unsecured creditors, who appear to be the only persons who have any substantial interest in asking for a winding-up, on the chance of there being a surplus, which nobody suggests there would be at the present moment, that they oppose the winding-up; they think it would be better for them that it should not be wound up, at all events for the present. I cannot help seeing that if ever there

was a case in which the Court ought to have regard to the 91st section and the power given to it—it is only a power—this is the case, it having been decided that the 91st section applies to the case of obtaining a winding-up order. I have in this instance a case where the Petitioner does not allege or pretend he can get any money out of the winding-up order, and does not even allege there will be assets to pay the costs of the winding-up. The company itself (that is, including all its paid-up shareholders—they are all paid up, and are, therefore, under no liability, but are entitled to the ultimate surplus if any should arise) do not wish for a winding-up order; and the simple contract creditors do not wish for a winding-up order; and this single secured creditor, who can get nothing more under a winding-up order than he would get under the deed of trust, except the pleasure of paying the costs, is the only person who asks me to embarrass the company by winding it up.

The Respondents say, "Let the petition stand over. Our property is in this position: By a series of unfortunate accidents for which we are not responsible, it was only on the 5th of December last that the dock began earning money; we believe it will be a very prosperous concern; it was founded with a view of obtaining profit, and now it will be profitable, and if you give us time to see how it will work we shall probably pay you not only the interest to become due, but that which is in arrear; we shall pay you the current interest, and wipe everything off in two years." It is not asked that I should give them the two years; that is their estimate; but it is asked that I should give them six months, the property being situate at *St. Thomas'*, a considerable distance away. I must say I think the delay reasonable, and I am not prepared to say that if they shew me that they have paid something, or are prepared to pay something when they come again in six months, that I shall not perhaps extend the time, and the more so when I consider this, that no harm can be done to the Petitioner, because they cannot make any improper payment so long as the petition for winding up remains suspended; they must pay their debts only according to their proper priorities, because whenever an order is made any other payment would be disallowed as having been made after the commencement of the winding-up. But I

M. R. 1876 — *In re* St. Thomas' Dock Company. — Judgment.

think if I make the order as I intend to make it, that the petition should stand over for six months from to-day, I should put the company on an undertaking, first of all, not to consent to a winding-up order on the petition of any other creditor, or to a voluntary winding-up; secondly, to give notice to the Petitioner of the presentation of any other petition for a winding-up; and, thirdly, to consent that on the presentation of any such other petition the present application may be renewed notwithstanding the suspension, so that the Court may be able to deal with it as if no suspension had been made.

Solicitors: *Pattison, Wigg, & Gurney; Radcliffe, Cator, & Martineau.*

M. R. 1876 — *March* 17.

HODGSON *v.* JEX.

[1876 H. 78.]

Will—Words, "Plate, Linen, Furniture, and other Effects"—Ejusdem generis—Residuary Gift.

4 Ch. D. 436
447
— 861

Testatrix, after devising certain freehold property, bequeathed to the Plaintiffs "all my plate, linen, furniture, and other effects that may be in my possession at the time of my death." She was at the time of her death entitled to the property devised by her will, to furniture, plate, linen, wearing apparel, and jewellery, and to certain sums of money:—

Held, that the Plaintiffs were entitled to the residuary personal estate of the testatrix.

Statement.

DEMURRER.

Susannah Dorothy Hodgson, by her will, dated the 25th of June 1873, after giving certain ground-rents and shares in freehold houses, as therein mentioned, continued as follows:—

"I give, devise, and bequeath to my sister, *Anne Gray*, for the term of her natural life, all my furniture, plate, linen, and other effects that may be in my possession at the time of my death, and, after her decease, to the children of my brother, *Philip Brown Hodgson*, who shall then be living, equally, share and share alike."

The will contained no other residuary gift.

The testatrix died on the 11th of December, 1875, and her sister,

Anne Gray, died shortly afterwards. At the time of the testatrix's death she was entitled, in addition to the freehold property mentioned in her will, to furniture, plate, linen, wearing apparel, and jewellery, to a sum of cash, to two sums secured on promissory notes, and £130 in the savings bank.

Statement.

The Plaintiffs, the children of *Philip Brown Hodgson*, living at the death of *Anne Gray*, claimed, in an action against the executors, to be entitled as residuary legatees to the whole of the personal estate of the testatrix not required for the payment of her debts and funeral and testamentary expenses.

The Defendants demurred.

Argument.

F. A. Lewin, for the Defendants :—

The words of the gift in question, "all my furniture, plate, linen, and other effects," are not sufficient to pass the residuary personal estate of the testatrix, because the words "and other effects" following the items enumerated must be taken to mean other effects *ejusdem generis*.

Maidlow, for the Plaintiffs, was not called on.

Judgment.

JESSEL, M.R. :—

I am of opinion that, under this gift, the residuary personal estate of the testatrix must be taken to pass. The words are, "all my furniture, plate, linen, and other effects that may be in my possession at the time of my death." It is alleged that the words "other effects" are to be cut down so as to mean that which is something like furniture, plate or linen. But the answer is, that the words of a will ought to have their natural meaning given to them unless there is some contrary intention appearing in the will. The mere fact that the testatrix enumerates some items before the words "and other effects," does not alter the proper meaning of those words. The demurrer must be overruled.

Solicitors: *Thomson, Son, & Brooks.*

M. R.
1876
Feb. 21.

VANE *v.* VANE.

[1876 V. 5.]

VANE *v.* VANE.

[1876 V. 6.]

Chancery Division—Jurisdiction—Person of Unsound Mind not so found—Guardianship and Maintenance.

8 Ch D 258
10 Ch D. 607
12 C D 364-5

The Chancery Division has jurisdiction to give directions as to the guardianship and maintenance of a person of unsound mind not so found, but will not exercise it unless the property is small and proceedings are not intended to be taken in Lunacy.

Statement.

13 Ch D 773.
15 Ch D 79

THE first of these actions was commenced on the 15th of February, 1876.

The Plaintiff was *Sarah Jane Vane*, a person of unsound mind not so found, by her next friend; the Defendants were the trustees of a settlement and will, under which the Plaintiff (aged seventy-three) was entitled for life to an annual income of £175, which was her only property. The writ claimed the administration of the trusts of the settlement and will so far as related to the funds in which the Plaintiff was interested; the appointment of a guardian, and directions as to the maintenance of the Plaintiff.

The second action was commenced on the 17th of February, for precisely the same object. The Plaintiff and Defendants were the same; the next friend, however, was different, being in this case a near male relation of the Plaintiff.

The first action was brought on as a short cause, but stood over in order that the authorities on the jurisdiction of the Court to appoint a guardian and give directions as to the maintenance of a person of unsound mind not so found might be looked into.

Argument.

Chitty, Q.C., and *W. D. Rawlins*, for the Plaintiff in the first action, now cited the following authorities: *Shelford* on Lunacy (1); *Corporation of Burford* v. *Lenthall* (2); *In re Fitzgerald* (3); *Sher-*

(1) Page 16. (2) 2 Atk. 551, 553.
(3) 2 Sch. & Lef. 432, 438.

Rutson Re Pugh 27 W R 57 1 Ly 12 C D 364
when it was stated they had no power to
appt a guardian
This case is unanimously reported the order was to appt a person

wood v. *Sanderson* (1); *Nelson* v. *Duncombe* (2); *Bishop of Exeter* v. *Lord Ward* (3); *Edwards* v. *Abrey* (4); *Seton* on Decrees (5); *Light* v. *Light* (6); *Eyre* v. *Wake* (7); *Machin* v. *Salkeld* (8).

[JESSEL, M.R.:—In all those cases there appears to have been a fund in Court.]

Chitty said that the trust funds would be brought into Court in this action.

Roxburgh, Q.C., and *Yate Lee*, for the Defendants.

JESSEL, M.R.:— Judgment.

I am satisfied that the Court has an original jurisdiction to give directions as to the guardianship and maintenance of a person of unsound mind not so found. I do not say that the jurisdiction does not exist where the person of unsound mind has been found a lunatic, but if it exists, it is never exercised, there being another jurisdiction, viz., that of Lunacy, more appropriate in such a case.

There being, then, jurisdiction in the cases of persons of unsound mind not so found, the question is, under what circumstances it ought to be exercised? In all the cases which have been cited two circumstances have concurred: first, the property has been small; and, secondly, it was impossible, for some reason or other, to obtain an order in Lunacy. The Legislature has now, in the *Lunacy Regulation Act*, 1862, s. 12, indicated what amount of property ought to be deemed small. The amount of property in the present case exceeds that limit, but it is, notwithstanding, really a small property, and I should be disposed to make an order if there is no opposition; but if the next friend in the second action raises any question as to the custody of this lady, and intends to take proceedings in Lunacy, I cannot do it.

Smart, for the next friend in the second action, said that he had no such intention.

(1) 19 Ves. 280, 288, 289.
(2) 9 Beav. 211.
(3) 2 My. & K. 54.
(4) Coop. C. P. 177, 188, 195, 207.
(5) Vol. ii. p. 710.
(6) 25 Beav. 248.
(7) 4 Ves. 795.
(8) 2 Dick. 634.

M. R.
1876
VANE
v.
VANE.
VANE
v.
VANE.
Judgment.

The MASTER OF THE ROLLS thereupon ordered the actions to be consolidated, and made a decree for the execution of the trusts of the settlement and will, with the usual accounts and inquiries as to the trust funds subject thereto, and also directing the appointment of a guardian of the person and estate of the Plaintiff, with inquiries as to her past and future maintenance; and the Defendants were ordered to bring into Court the funds admitted by them to be in their hands; and the carriage of the decree and the conduct of the consolidated actions was given to the Plaintiff in the first action; and further consideration was reserved.

Solicitors: *Bolton, Robbins, & Busk; Belfrage & Middleton.*

SMITH *v.* PILGRIM.

V.-C. M.

1876

[1873 S. 141.]

Feb. 21, 22, 23.

Bankruptcy—Fraudulent Preference—Knowledge of Insolvent Circumstances—Negotiation for and Promise of Security—Imperfect Evidence as to date of Execution of Security—Replication—Fresh Evidence—Application made only at Hearing—15 & 16 *Vict. c.* 86, *s.* 38.

Post 322.

A solicitor, shortly before absconding as an insolvent debtor, had given securities to the Defendant, who was one of his clerks, and who the Court was satisfied on the evidence was a *bonâ fide* creditor. The bankrupt left on the 28th of October, 1872, having two days previously signed a declaration admitting his inability to pay his debts. The securities bore date the 30th of September; but they were not executed till after that day. The deeds were engrossed in the office of the bankrupt on the 10th of October; and were executed on the 14th of October. They were not stamped till after the bankrupt absconded. The Defendant had been pressing for security during August and September, and it had been promised; and the drafts of the securities were prepared in September:—

Held, on a suit by the trustee in bankruptcy to set aside the securities as being a fraudulent preference, that the pressure and promise of security were sufficient to rebut the presumption of a fraudulent preference arising from the circumstances, and would sustain the deeds even if the knowledge of the insolvency were brought home to the Defendant.

Where in a cause heard on replication it is sought to put in evidence filed after the time for closing evidence has expired, leave to read such evidence must be applied for previously to the hearing, in order to enable the Court to provide an opportunity to the adverse party to answer such evidence. It will not be sufficient to deliver a copy of the evidence to the other party in time for him to answer it.

Statement.

THIS was a bill by the trustee in bankruptcy of *Thomas Henry Scarborough*, a solicitor, who had absconded after having misappropriated trust funds left in his hands, to set aside three deeds by which he secured certain sums of money to the Defendant, who had been for many years one of his clerks, as being fraudulent and void as against his other creditors under the 92nd section of the *Bankruptcy Act*, 1869.

The facts of the case were shortly as follows:—

Since the year 1839 the Defendant had been a clerk to *Scarborough* and his predecessors in business, and from an early period

V.-C. M. 1876 SMITH v. PILGRIM. Statement.

had begun to accumulate a little money by savings out of his salary and what he had earned by working overtime.

In September, 1864, *Scarborough*, who was then, besides conducting his regular business, engaged in building speculations, involving the loan of money at high rates of interest to builders, proposed to the Defendant to allow him interest at the rate of £8 per cent. on any spare funds he might have. The Defendant had then £200, which he lent *Scarborough* on these terms; and this was the beginning of a series of transactions which resulted in leaving *Scarborough* indebted to him by the end of August, 1872, in a sum of £1756. In March, 1868, the Defendant applied to the *Hackney Permanent Benefit Building Society*, of which *Scarborough* was the solicitor, for a loan upon the security of a house at *New Malden*, which had been purchased by him the previous year. The society agreed to lend £1500, repayable by monthly instalments, on his executing a first mortgage of the property. In order to effect this, he arranged to pay off an existing mortgage thereon; and on the 2nd of April the secretary to the society sent him a cheque for £750 on account of the advance. This was insufficient to pay off the previous mortgage, and, as he had not sufficient money by him to make up the amount required, he retained this sum till he could receive the remainder of the loan. *Scarborough* then requested him to pay the cheque to his account, as a temporary loan to one of the builders, with whom *Scarborough* was then speculating. On the 28th of April, 1868, the society sent a further cheque for £728 18*s.* 6*d.*, the balance of the loan after deducting the expenses of the advance. This cheque was received by *Scarborough*, and without the Defendant's knowledge or consent paid by him into his account at the *London and County Bank*. The Defendant had then no banking account, and was for convenience accustomed to use that of *Scarborough*. The Defendant requested that the other mortgagee might be paid off out of the funds so received, and the new mortgage completed, but *Scarborough* postponed the completion from time to time on various pretexts, and in the result the security was never completed, and the Defendant had to repay out of his own funds the money advanced by the society; and in August, 1872, this sum, as well

as that before mentioned, was due to the Defendant from *Scarborough*.

The Defendant stated by his answer—and it was not contradicted—that from the end of 1869 to June, 1871, he continued to press *Scarborough* to complete the security to the building society, but without avail, and in June, 1871, he made a proposal that an arrangement should be come to by which *Scarborough* should give him a mortgage to secure the repayment of all moneys due, and all sums which he was legally, equitably, or morally bound or liable to pay for him or on his behalf. The completion of this arrangement, however, was delayed from various causes, but on the 1st of August, 1872, the Defendant, having then determined to leave *Scarborough's* office at the end of the year, went to him, and insisted on the mortgage being prepared. *Scarborough* thereupon directed a draft of the proposed mortgage to be prepared; and this was done the first week in August, and sent to *Hastings*, where *Scarborough* was then staying, for his approval.

At this time the Defendant also believed that he had rendered himself liable, on various transactions in which he had concurred with *Scarborough* for the latter's benefit, to sums amounting altogether to £12,220, in addition to the £2856, and that, allowing for interest, there was a total liability to be provided for of £16,000. It was afterwards however discovered that this was an over-estimate of the liabilities so incurred.

Scarborough returned the draft at the end of August, 1872, and on the Defendant remonstrating with him on the delay which had taken place, he said that he wished to have some alteration made in the form of the draft. It appeared that the alteration he wished was to have the property forming the principal security assigned by two deeds instead of one, and this alteration was made accordingly. On the 21st of August, 1872, the Defendant lent *Scarborough* a further sum of £40, which it was agreed should be added to the general debt.

The Defendant also stated in his answer that he had arranged to leave town for his holiday in the first week in September, 1872, and was very desirous of getting out of town, but hesitated to do so whilst the mortgages remained unexecuted. But, relying on an assurance of *Scarborough* that he would execute the deeds as

V.-C. M. 1876 SMITH v. PILGRIM. Statement.

soon as they were engrossed, he left town, and on the 9th of September, the matter being still delayed, he wrote to complain, and in answer received a letter from *Scarborough* stating that he had a much better plan to propose to him when he returned to town, and that he deferred executing the deeds till he should see him. This letter, however, the Defendant had not preserved.

He further stated that he returned to town in the last week in September, 1872, and then *Scarborough* said he could make arrangements which would enable him to pay the whole of the Defendant's claim, and thus render a mortgage unnecessary. The Defendant pointed out that the mortgage was also an indemnity against the several liabilities which he had incurred to oblige *Scarborough*, and which could not then be satisfied, and that, whatever arrangement might be made about paying off the actual amount due to him, he still should insist on having the mortgage executed as an indemnity. *Scarborough* requested him not to stamp the mortgages or give notice to the first mortgagees for a few weeks, and they were not stamped till *Scarborough* had absconded.

It appeared that for some time past *Scarborough* had been frequently in want of ready money, and was in the habit of borrowing small sums from the Defendant and other persons. The Defendant, however, stated in his answer, that previously to *Scarborough's* flight and bankruptcy he had not the slightest idea that he was in embarrassed circumstances. This was explained in cross-examination to mean that he considered the want of ready money to arise from his having much of his capital locked up by his building speculations, and that, knowing him to be a man of wealth in former time, he always believed that his difficulties were temporary only, and that he would recover his position in a little time.

The three deeds in question bore date the 30th of September, 1872. The first was an absolute assignment to the Defendant of a security for a debt of £1000 due to *Scarborough*, and a life policy for securing it. The second was a second mortgage on certain real and leasehold property, and on a sum of £6000 payable to *Scarborough* by an insurance company on his attaining the age of fifty-five years, subject to an annual premium of £400,

to secure the debt of £2856, and such further sums as he might pay under his liability as surety or otherwise for *Scarborough*. The third deed was a second mortgage on some other real estate, some policies on the life of *Scarborough*, and shares in some joint stock companies, expressed to be to secure the same debt and liabilities.

Statement.

These deeds were not executed on the 30th of September. It was proved at the hearing that they were engrossed by the son of the Defendant, who was also a clerk of *Scarborough*, on the 10th of October, and the Defendant, by his answer, stated that they were executed on or about the 14th of October. In his examination in the bankruptcy of *Scarborough*, the Defendant could not fix the date of the execution, but inclined to fix upon the first week in October, but in his cross-examination in the suit he fixed finally upon the 14th of October.

Scarborough absconded on the 28th of October, having two days previously signed a declaration of his inability to pay his debts; and the case set up by the bill was in effect that the deeds were executed without pressure on the eve of his absconding, and that the debts supposed to be secured never had any real existence, and that the entire transaction was collusive, and a fraud upon the other creditors of the bankrupt.

Argument.

Higgins, Q.C., and *Northmore Lawrence*, for the Plaintiff:—

Where there is nothing which can be considered as approaching to collusion, a small amount of pressure may be sufficient to support the deeds. But in this case collusion is manifest from the circumstances. The bankruptcy relates back to the time of the bankrupt absconding, and in that way the execution of the deeds becomes so closely connected with the bankruptcy as to make the fact of the fraudulent preference clear: *Re Bowles' Mortgage* (1).

It is clear that the transaction was not *bonâ fide*, and the deeds were never intended to have been put in force if *Scarborough* had not left. In order to uphold them it must be shewn beyond question that the object was not to put the property out of the

(1) 22 W. R. 817; on appeal, 31 L. T. (N.S.) 365.

V.-C. M. 1876 SMITH v. PILGRIM. Argument.

reach of the ordinary creditors: *Ex parte Hodgkin* (1); and this cannot be done. Where there is a fraudulent and collusive arrangement it cannot stand, even where there is pressure by the creditor: *Ex parte Reader* (2); and this must be distinctly made out, particularly in the case of a clerk or servant of the debtor: *Ex parte Halliday* (3).

Glasse, Q.C., and *T. L. Wilkinson*, for the Defendant:—

This is a suit founded in fraud, and unless the Plaintiff succeeds in establishing a fraudulent preference of the Defendant the bill must be dismissed. No right of redemption can be founded upon it. Now it is clearly established by the evidence that there was a *bonâ fide* debt, then pressure, and, lastly, not only a promise of security, but the actual settlement of the details and the preparation of the drafts.

On the authorities, the deeds must be supported. Whatever date these deeds were executed, it must have been before *Scarborough* went away, and that distinguishes this case from *Re Bowles' Mortgage* (4). The question there really was whether the bankruptcy related back to the act of bankruptcy, and it was held that it did, and therefore that a deed executed after that event was necessarily void. *Ex parte Hodgkin* is in the Defendant's favour, so far as it is in point at all. The security was given on the 10th of October, after the fact of insolvency was disclosed, and on the 12th the act of bankruptcy was committed, and the Court upheld the transaction. *Ex parte Reader* was simply an arrangement to take money from one person in order to pay another. *Alton* v. *Harrison* (5), though a case under the Act of 13 Eliz. c. 5, shews that if the *bonâ fide* object of the transaction is to give a security it cannot be impeached merely because the result may be to benefit some only of the creditors. And in *Ex parte Tempest* (6), which was under the *Bankruptcy Act*, 1869, it was held that where the completion of a security is delayed by some circumstances and takes place on the very eve of bankruptcy, a merely verbal promise made previously on pressure will support

(1) Law Rep. 20 Eq. 746.
(2) Ibid. 763.
(3) Ibid. 8 Ch. 283.
(4) 22 W. R. 817; 31 L. T. (N.S.) 365.
(5) Law Rep. 4 Ch. 622.
(6) Ibid. 6 Ch. 70.

V.-C. M. 1876 SMITH v. PILGRIM. Argument.

the transaction. So, in *Ex parte Topham* (1), where goods were on pressure returned by the bankrupt the day before the bankruptcy, the Court of Appeal reversed the Chief Judge in Bankruptcy on the authority of his own decision in *Ex parte Blackburn* (2), and held that there was no fraudulent preference. This transaction cannot be impeached on account of the Defendant's position as the bankrupt's clerk, when the parties were once in a hostile position towards each other: *Johnson* v. *Fesenmeyer* (3), where the bill was of a very similar character to the present one.

Higgins, in reply:—

The cases cited by the Defendant do not alter the legal principles involved in the case. The transaction is still open to the objections that the existence of the debt is not free from suspicion, and that it is almost impossible to consider the transaction *bonâ fide*. Neither *Ex parte Tempest* (4) nor *Ex parte Blackburn* were cases where any suspicion attached to the debt itself. But sect. 92 of the *Bankruptcy Act*, 1869, avoids deeds absolutely except where good faith is shewn, and the fact of the securities being prepared in the debtor's office, and the secrecy with which the transaction was conducted, are material circumstances with reference to *bona fides*; and *Ex parte Hodgkin* (5), *Ex parte Topham*, and *Ex parte Tempest*, all shew that the onus is upon the Defendant to shew that the transaction was a proper one. If he has not done so his case necessarily fails. *Alton* v. *Harrison* (6) was a case entirely under the Act of *Elizabeth*, and related to a different point.

Judgment.

MALINS, V.C., after stating and commenting on the facts, and concluding upon the evidence that there was a *bonâ fide* debt for which the security afterwards given had been promised previously in consequence of pressure by the creditor, and that the date of the execution was the 14th of October, continued:—

Having now occasion to consider the law of fraudulent preference, and having had on many other occasions to look into the

(1) Law Rep. 8 Ch. 614.
(2) Ibid. 12 Eq. 358.
(3) 25 Beav. 88; 3 De G. & J. 13.
(4) Law Rep. 6 Ch. 70.
(5) Ibid. 20 Eq. 746.
(6) Ibid. 4 Ch. 622.

V.-C. M. 1876 SMITH v. PILGRIM. Judgment.

authorities, I am bound to say that it is in a state of very considerable difficulty. There is no absolute rule; its application must depend upon the circumstances of each particular case. But to this extent it now seems to be clearly settled by all the authorities. A debtor must not of his own mere motion, without pressure or application, give a security to a creditor on the eve of bankruptcy, and if he does, that is a fraudulent preference. But if there be any pressure or negotiation for a security on the part of the creditor, then the fact that the creditor knows the debtor to be in embarrassed circumstances is no objection to the validity of the security. He may know him to be greatly pressed, he may know him to be surrounded with difficulty, and yet may urge him for a security, and if in consequence of that pressure he gets a security, it is within the saving of the 92nd section of the *Bankruptcy Act*, 1869. That section is in these terms: "Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own moneys in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall, if the person making, taking, paying, or suffering the same become bankrupt within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee of the bankrupt appointed under this Act" (that would be where it was the voluntary act of the debtor); "but this section shall not affect the rights of the purchaser, payee, or incumbrancer in good faith and for valuable consideration." Now, then, it must be shewn that the thing is done in good faith, and that it is for valuable consideration. If I am right in my conclusion, that money was due to *Pilgrim*, then it was for valuable consideration. Was it done in good faith? Now, on this point, as I have said, there is no objection to the creditor knowing that his debtor is in embarrassed circumstances. Mr. *Glasse* cited a very important authority on that subject—*Johnson* v. *Fesenmeyer* (1). That is a case in which *Archbutt*, the bankrupt, was indebted to his solicitor, Mr. *Fesenmeyer*, and Mr. *Fesenmeyer*, knowing that he was in

(1) 25 Beav. 88; 3 De G. & J. 13.

embarrassed circumstances, requested a security for his debt, and six weeks before the bankruptcy *Archbutt* gave him a security accordingly. This was a case like the present, the application being by the assignee in bankruptcy to set aside the security as having been obtained by fraud and undue preference; the point decided was, that if a trader on the eve of bankruptcy, yielding to the *bonâ fide* pressure of a creditor, give him a security on part of his property, that would not be a fraudulent preference, although both parties might be aware of the impending bankruptcy; but that if the debtor, even on pressure, were to assign the whole of his property to a creditor, so as to disable him from continuing to carry on his business, that would be a fraudulent preference, and invalid against the other creditors upon a bankruptcy. Lord *Romilly*, in deciding that case, expresses himself thus (1): "Upon a perusal of the evidence I find it confirms the view which I stated yesterday. If a man is insolvent, and disposes of a portion of his property in favour of a *bonâ fide* creditor, although upon the eve of bankruptcy, and although this fact be known or believed by both parties, it may be a perfectly valid and legal transaction. To render it invalid, there must be a disposition on the part of the insolvent to favour that particular creditor, and this is generally shewn by the fact that the first step or proposal towards the disposal of the property in favour of that creditor proceeds from the insolvent debtor. But if the creditor, although he knows that the debtor is insolvent" (and it has been strongly urged upon me that the Defendant must have known *Scarborough* was insolvent), "presses and insists upon having a security for his debt, and the debtor yield to that pressure, and give the security, although it may be well known to both at the same time that the effect will be to give to that particular creditor an advantage over the other creditors of the insolvent, the transaction, in my opinion, is perfectly good and valid. I wish to state it quite broadly, in order that if the matter goes further the grounds upon which I proceed may be fully understood." It did go further, and those reasons were adopted by Lord *Chelmsford* (2). Lord *Romilly* had dismissed the bill with costs, and Lord *Chelmsford* dismissed the appeal with costs. That was certainly a very strong case, because

(1) 25 Beav. 93. (2) 3 De G. & J. 13.

V.-C. M. 1876 SMITH v. PILGRIM. Judgment.

the solicitor knew of the embarrassment of the client, and yet got a security for a bill of costs which was greatly to the detriment of the other creditors. *Ex parte Tempest* (1), one of the cases cited by Mr. *Wilkinson*, and commented upon this morning by Mr. *Higgins* in his reply, will be remembered as a case in which the creditor, finding that the debtor's business was being carried on very unsatisfactorily, inasmuch as the manager and his wife were both intoxicated when he went there, told the debtor he must have his money or security, and I find Lord Justice *Mellish* thus expresses himself (2): "I think that the Chief Judge rightly applied the principle of *Brown* v. *Kempton* (3), as carried out in many subsequent cases. Had the question been one purely of fact, I should have given great weight to the decision of the County Court Judge who heard the principal witness examined before him, but we do not know the ground of his decision; and from the nature of the questions which, judging from the answers, he must have put to the witness, I infer that, not having had the recent cases cited before him, he had not fully in his mind the rule which they establish as to fraudulent preference, that if there is a mixed motive, if the debtor is partly influenced by a demand of the creditor, or by negotiations with him, the act is not a purely voluntary act, and is not a fraudulent preference, although the creditor may be a friend whom the debtor wishes to prefer. In the present case, I think that there was a *bonâ fide* demand for security, and then a *bonâ fide* negotiation as to what the security should be; and though the debtor might know that he was hopelessly insolvent, he did not contemplate immediate bankruptcy, but was trying to stave it off. He then makes an arrangement with this particular creditor, which resulted in what appears to me to have been a *bonâ fide* sale." Now, there the Lord Justice *Mellish* puts it upon a *bonâ fide* negotiation for security. I have pointed out that the negotiation for a security certainly commenced here in the month of August, was continued during the month of September, and I think I must regard it as having been continued down to the execution of the deeds.

Was there a *bonâ fide* negotiation? I have already pointed out

(1) Law Rep. 6 Ch. 70. (2) Law Rep. 6 Ch. 76.
(3) 19 L. J. (C.P.) 169.

that I am bound, on the whole evidence, to come to the conclusion that there was; even though, as Lord Justice *Mellish* says, the Defendant knew that the debtor was hopelessly insolvent. In this case, if the Defendant had known that *Scarborough* was hopelessly insolvent, yet he was at liberty in the month of August to negotiate for a security, to continue that negotiation during the month of September and October, and to obtain the security some time in the month of October, which would be valid against the assignee in bankruptcy within a fortnight after the execution of the deed. I need not go further into the case of *Ex parte Topham* (1), cited by Mr. *Higgins* and by Mr. *Wilkinson*, because there the creditor was pressing his debtor for payment; he knew he was insolvent, and was pressing for payment, and there was a negotiation which ended in the return of £250 worth of goods which he did not want; they were returned the very day before the bankruptcy, and that was held to be good. The rule is laid down in the broadest terms. Therefore I consider the law to be settled that, if there be a *bonâ fide* negotiation for security and the security be given on the very eve of the bankruptcy, and the person taking the security knows the debtor was hopelessly insolvent, the transaction is valid according to law, and that everything depends upon the *bona fides* of the transaction.

Now, therefore, on the whole, I come to the conclusion, first of all, that there was a debt owing from *Scarborough* to the Defendant, that the amount of that debt was settled by *Scarborough* at a time when he was perfectly competent to settle it, and that the settlement is binding upon those claiming through him.

Secondly, I am bound to come to the conclusion, upon the whole evidence, that there was a *bonâ fide* negotiation for a security, continued during August, September, and the middle of October, and that even if the deed was executed as late as the 21st, according to the rule stated by Lord Justice *Mellish* and concurred in by Lord Justice *James*, it was time enough to make it valid against the assignee.

Therefore, extraordinary as the facts are, I feel compelled to come to the conclusion that the case fails, and that the bill must be dismissed; but, considering the Plaintiff's want of knowledge

(1) Law Rep. 8 Ch. 614.

V.-C. M. 1876

SMITH v. PILGRIM.

of the date of execution of the deed, and the nature of the transaction, I think it must be without costs.

Statement.

The cause was heard on replication, and it was desired on behalf of the Defendant to read an affidavit sworn and filed after the time for closing evidence had expired. The evidence was closed on the 19th of September, 1874, and the affidavit which it was desired to use was sworn on the 21st of January and filed on the 22nd of January, 1875. No application for leave to use it was made previously to the hearing, but a copy of it was sent to the Plaintiff with notice that application would be made to read it, in time to allow of his filing other evidence in reply. The object of it was to contradict some of the statements in one of the Plaintiff's affidavits.

Argument.

Glasse, Q.C., and *T. L. Wilkinson*, in support of the right to read it:—

This is one of the cases in which further evidence may be allowed: *Thompson* v. *Partridge* (1).

Higgins, Q.C., and *Northmore Lawrence*, for the Plaintiff:—

This application is without precedent. There is no case in which such leave has been granted except upon an application made before the hearing. There ought to have been a previous application in Court: *Thexton* v. *Edmonston* (2).

Glasse, in reply:—

The proper time to make an application of this kind is at the hearing: *Bayley* v. *Cass* (3). The Court always reserves the question of the admissibility and weight of the evidence to the hearing: *Leech* v. *Bolland* (4). Even in the Court of Appeal, evidence which was not before the Court below is allowed to be put in.

Higgins:—That is where a cause is heard on motion for decree.

(1) 4 D. M. & G. 794. 17 Jur. 1108
(2) Law Rep. 5 Eq. 378.
(3) 10 W. R. 370.
(4) Law Rep. 10 Ch. 362.

MALINS, V.C.:—

This is a cause heard on replication. In this way of bringing a cause on it not unfrequently happens that one side or the other is taken by surprise on discovering that matters are produced in evidence which were not indicated in the pleadings, and which it is desired to meet. But I take it to be clear by the words of the 38th section of 15 & 16 Vict. c. 86, that no affidavit filed after the time for putting in evidence has closed can be used without special leave of the Court previously obtained for that purpose. In my opinion that means that leave must be obtained previously to the hearing of the cause. Because by this means the Court can take care that proper protection is given to the other parties to the cause. But it could under no circumstances be admitted without giving an opportunity to the other side to put in evidence in answer.

It is very true that Sir *John Stuart* says in *Bayley* v. *Cass* (1) that the proper time to apply to read additional evidence is at the hearing of the cause. But I think he must be understood as meaning that it should then be finally decided whether the evidence was to be read.

Mr. *Glasse* cites *Leech* v. *Bolland* (2) as an authority in support of this view. But it turns out that in that case the application was made before the hearing, and the order was made in such a form as to allow of a cross-examination if the Plaintiff desired it. That was the course I adopted in *Hayward* v. *Jolliffe*, in which Mr. *Bristowe* made an application to me for a similar order on the 28th of January, 1875. I think the application ought in all cases to be made before the hearing; I must, therefore, reject this evidence.

Solicitors: *Lewis, Munns, & Longden; C. Preston.*

(1) 10 W. R. 370.

(2) Law Rep. 10 Ch. 362.

V.-C. B.

1876

Jan. 22.

CASHIN *v.* CRADDOCK.

[1875 C. 8a.]

Practice—Discovery—Summons by Plaintiff for Production of Documents before delivery of Statement of Claim—Summons dismissed—Rules of Court, 1875, *Order* XXXI., *rr.* 11, 12, 18, 19.

It is not consistent with the practice of the Court to make an order for production of documents on the solicitor of a party against whom discovery is sought.

A Plaintiff will not in general be allowed production from a Defendant until he has delivered a statement of claim.

A Plaintiff (after the 2nd of November, 1875) issued a writ of summons against several Defendants, the indorsement of claim comprising a great variety of seemingly unconnected matters; and then, before delivering a statement of claim, took out a summons for the production, "by the solicitor of the Defendants and others named in" a schedule to an affidavit of even date, of certain documents specified in the schedule; stating by the affidavit that the specified documents were in the possession of the persons named, and that the whole of the documents related to the action, and were essential to establish the Plaintiff's case:—

Held, that the Plaintiff was not entitled to the production asked.

Statement.

ADJOURNED SUMMONS.

Thomas Frederick Cashin, on the 4th of November, 1875, took out a writ of summons against six persons named *Henry Craddock*, *Edward De Grey*, *Bowyer Smyth*, *Guy Senior*, *Christopher Jenkins Dibb*, and *Milton Bradford*, the indorsement of which, so far as material, was to the following effect:—

The Plaintiff's claim is for damages for breach of contracts, and for "fraudulently and maliciously conspiring" to cause "the cancellation and non-performance" of a certain agreement, and for "fraudulently and maliciously, and without reasonable and probable cause, conspiring to prosecute certain legal proceedings with a view to harass and annoy the Plaintiff," and to "cause him to desist from enforcing" the contracts; also "for £555 7*s.* 10*d.* for coals supplied, and other sums of money" to which the Plaintiff was entitled, "which were received and misapplied by the Defendants, *Henry Craddock*, *Edward De Grey*, *Bowyer Smyth*, and *Guy Senior*;" also for "the execution of a decree," and for

"damages for breach of an order for an injunction;" also for specific performance of the above agreements for a lease by the Defendant *Senior* to the Plaintiff of a colliery.

Statement.

On the 9th of December the Plaintiff, without having delivered a statement of claim, took out a summons for the 14th, "that the solicitor of the Defendants, and others named in the schedule annexed to the affidavit" sworn on the same 9th of December, should within four days [produce] and leave with the Clerk of Records and Writs the documents specified in the schedule, and stated in the affidavit to be in their possession, or allow the Plaintiff to have access to the same at the offices of "the said solicitor and others," and that the Plaintiff might be at liberty to inspect and peruse and take copies.

The affidavit, which was filed on the 18th of December, was as follows:—

"That an action herein is pending, and writs of summons issued out of this honourable Court have been served on the above-named Defendants.

"That the documents specified in the schedule . . . are in the possession, custody, or power of the persons respectively named herein.

"That the whole of the documents relate to the action herein, and are essential to establish Plaintiff's case."

In the schedule were set out a "list of documents in the possession, custody, or power of Messrs. *Bradford & Co.*, solicitors, or their clients, the Defendants *Craddock*, *Smyth*, and *Bradford*;" then a "list of documents in the possession . . . of Messrs. *Torr & Co.*, solicitors . . . or their clients, Messrs. *Senior* and *Dibb*;" and finally a "list of documents in the possession . . . of Mr. *James Waddell* . . . the official liquidator of the *Oakwell Collieries Company, Limited*, nominated at the instance of the Defendants."

The summons having been adjourned into Court by the Chief Clerk, the Plaintiff, on the 11th of January, filed an affidavit containing statements explanatory of the nature of his case.

Argument

Locock Webb, Q.C., and *Ryalls*, for the Plaintiff:—

This application is made under the practice as regulated by the Judicature Acts and Rules.

V.-C. B. 1876 CASHIN v. CRADDOCK. Argument.

Under rule 11 of Order XXXI., which is substantially equivalent to sect. 46 of the *Common Law Procedure Act*, 1854 (17 & 18 Vict. c. 125), the Court or Judge has power, if they or he shall think fit, "at any time during the pendency of" an action, to order the production of documents which to their or his reasonable satisfaction relate to the matter in question, and are in the possession of the party from whom discovery is sought. The words "at any time during the pendency of" an action, must mean even before pleadings have commenced; and Orders I. and II. shew that the commencement of the action is the issue of the writ of summons.

Then rules 12 to 17 embody substantially what was the late Chancery practice, under which either party could apply to the Court for an order on the other party to produce documents upon oath, with liberty to the party applying to inspect.

The right to inspect is now regulated by the 18th rule, which applies to two separate cases—one, where the document is referred to in the pleadings or disclosed in the affidavit of documents; the other, where the applying party deposes that the document is—meaning, to the best of his information and belief, is—in the possession of the other party.

Under Order XXI., rule 1 (*b*), the Plaintiff has six weeks from the entry of the Defendant's appearance within which to deliver his statement of claim, and the object of the Legislature may reasonably be presumed to have been, to give the Plaintiff an opportunity in the meantime of obtaining discovery, so that his statement may be correctly made, and the necessity of subsequent amendment avoided.

The old Chancery Rules as to discovery are, in effect, extended by the Judicature Act. Hitherto a Defendant has had an opportunity of seeing the Plaintiff's statement of claim before making discovery, and has been entitled to wait for such statement before producing the documents which relate to the subject of the action. The new legislation is so far in aid of plaintiffs, that it extends their right to "any time during the pendency of the action."

Kay, Q.C., and *Freeling*, for the Defendants *Senior* and *Dibb*:—

The practice of obtaining discovery by production of documents

originated in Chancery, and was adopted by the *Common Law Procedure Act*, 1854. The rules which formerly guided the Court of Chancery still subsist, unless they are abrogated in express terms. Amongst those rules was one which condemned the practice of filing what were called "fishing bills." In this case the indorsement is a claim for a number of matters without any apparent connection, imputing fraud and malice to the Defendants; and upon this the Plaintiff takes out a summons for the production of certain documents named and described, which however are not admitted, nor shewn by any evidence beyond the assertion of the Plaintiff, to have any relevancy to the matters in question. An order to produce under such circumstances would be a grievous oppression.

The rule which existed before the statute was, that a Plaintiff is not entitled to discovery until he has made a statement which will stand the test of a demurrer. There is nothing in the Judicature Acts to alter that rule. It may be admitted that, under rule 11 of Order XXXI., the Court has a discretionary power. There is no doubt the Court can, "at any time during the pendency of" an action, order production if it pleases; but we submit that, in the exercise of that discretion, the Court will be guided by existing rules.

The *Judicature Act* contemplates some cases, such as actions on bills of exchange, in which the making of any statement of claim is discouraged. This, however, is not one of such cases.

The 12th rule suggests a wholly different course. It is we who should be directed to make the affidavit. Suppose the Plaintiff's statement, founded upon this loose, wide, and unintelligible indorsement, should turn out to be wholly untrue, the wrong done to the Defendants, without any shadow of right, would be irremediable. The 13th rule, which gives to the party against whom production is sought an opportunity of specifying the documents which he objects to produce, confirms this view of the proper practice. As to inspection, rules 18 and 19 shew that the right is open to question, and, even after production, may be postponed for discussion and determination.

It has been argued that, under the *Common Law Procedure Act*, something of the kind now attempted was contemplated. The

V.-C. B. 1876 CASHIN v. CRADDOCK. Argument.

words (sect. 46) are, "upon the hearing of any motion or summons it shall be lawful . . . and upon such terms as they" (the Court) "or he" (the Judge) "may think reasonable." This clearly points to the occasion of some active proceeding; whereas here we are before the Court upon nothing but a summons to produce, in which no litigation or proceeding is pending.

It is also said that the granting of the period of six weeks must have been intended for the purpose of permitting discovery. Is it conceivable that it was intended a Plaintiff should have during this period power to ransack all the Defendant's repositories? Can it be doubted that the object was to give the Defendant, finding that a claim was about to be made against him, an opportunity of looking into the matter, and, if he should be so advised, of submitting or settling it?

Admitting the discretionary power under rule 11 to make the order asked for, it is submitted the Court will, unless possessed of proof of the substantial nature of the claim, and of the relevancy of the documents, and conclusive evidence of their being in the possession of the party proceeded against, decide to act upon the provisions of rule 12.

Jackson, Q.C., and *Bush*, for the Defendant *Bradford*:—

The order, so far as it extends to the solicitors, is clearly informal and bad.

Hastings, Q.C., and *Northmore Lawrence*, for the Defendants *Craddock* and *Smyth*:—

No order has been obtained under the 12th rule, which is the regular course. The Plaintiff, in order to get an order under rule 11, must make a special case and support it (see rule 18) by special evidence, in order that the Court may decide upon the propriety of the application.

Locock Webb, in reply:—

That an order upon a Defendant's solicitor to produce will be made when necessary, appears from *Vale* v. *Oppert* (1).

This action has been compared to a "fishing" bill, but the

(1) Law Rep. 10 Ch. 340.

Court will not listen to such an argument. We meet it by the assertion that the claim is a substantial one. Every word and phrase of the indorsement may not be defensible; but the meaning is clear; and as to the phraseology, there are ample powers of amendment under the statute.

Argument.

Ley v. *Marshall* (before *Lindley*, J., Jan. 13, 1876) is an example to shew that production may be had before statement of claim delivered.

In answer to the argument founded on oppression, it should be observed that, under the old practice, discovery might be had before answer.

[BACON, V.C.:—Yes, but not before bill filed.]

The issue of the writ with its indorsement is now equivalent to the filing of a bill.

Kay, in reply, on *Ley* v. *Marshall*:—

The order made in this case was for an affidavit of documents under rule 12.

BACON, V.C.:—

Judgment.

This application is admitted by Mr. *Locock Webb* to be novel, and is, in my opinion, purely experimental. It is not enough to say that it is totally at variance with the practice of the Court of Chancery existing before the *Judicature Act* was passed; the question is whether the *Judicature Act* authorizes this application to be made by the Plaintiff on the issue of a writ indorsed in the manner here appearing.

The 31st Order relates generally to discovery and inspection; and it is all to be read together; one cannot pick out the 11th rule and say that that is a separate enactment. I do not think the case would be mended, if one could. First, there is no intention on the part of the framers of this statute to abrogate the procedure of the Court of Chancery, unless where it is done by express enactment or statement; nor can I read this 31st Order, relating generally to discovery and inspection, as any attempt whatever to change the well-known practice of the Court of Chancery in that respect. The first rule of the Order provides "That

V.-C. B.
1876
CASHIN
v.
CRADDOCK.
Judgment.

the Plaintiff may, at the time of delivering his statement of claim, or at any subsequent time, ... deliver interrogatories," and so on. That is a recognition of the practice prevailing in the Court of Chancery before. The delivery of the Plaintiff's statement must precede his right to exhibit interrogatories. It is only by means of interrogatories, or by means of the affidavit which the 12th rule enables the Plaintiff to call for, that he can have that discovery on which alone the Court can make an order for production. The 11th rule provides that "It shall be lawful for the Court or a Judge, at any time during the pendency therein of any action or proceeding, to order the production by any party thereto, upon oath, of such of the documents in his possession or power relating to any matter in question in such action or proceeding, as the Court or Judge shall think right." The Judge, therefore, when called upon to exercise the discretionary power which that 11th rule vests in him, must have regard to every other rule of the Order, and cannot exercise his discretion unless he takes a general view of the subject.

I have heard no answer suggested by Mr. *Webb* to the observation of Mr. *Kay*, that the true meaning of the rule is, that until the Plaintiff has delivered a statement of claim, he is not in a condition to interrogate the Defendant, for the Defendant may demur to the statement. In my opinion that argument is entitled to very great weight.

But, without that, neither according to the old practice as it is admitted, nor, as I read the statute, according to the new practice, would it be right to make an order upon the Defendants' solicitors, over whom this Court has no direct jurisdiction in the action that is pending. It has jurisdiction over them as officers of the Court, no doubt; but this is an application for an order against solicitors, who have first a duty to discharge to their clients. It is a summons for an order "that the solicitor of the Defendants and others named in the schedule annexed to the affidavit"—I do not know how to read that—whether it means "the solicitor of the Defendants and of others named in the schedule—or whether it is meant to include parties who are not parties to the action, is not very clear, and is immaterial—"shall produce and leave with the Clerk of Records and Writs in whose Division this cause is the

documents specified in the aforesaid schedule, and stated in the said affidavit to be in their possession, custody, or power, or allow the said Plaintiff to have access to the same at the respective offices of the said solicitor and others, and that the said Plaintiff may be at liberty to inspect and peruse the documents so produced;" and this demand is made upon the solicitors of the Defendants, over whom, in my opinion, neither by statute nor otherwise, for the purposes of this application, has this Court, or will this Court, exercise any such jurisdiction. It is founded on an affidavit which states "that the whole of the documents relate to the action herein, and are essential to establish the Plaintiff's case." That may be literally true—to establish his case when the action comes to be tried; but what I desire to be satisfied of, before I exercise the jurisdiction which the 11th rule vests in me, is, that they are essential to the statement of the Plaintiff's claim; and this he has nowhere asserted.

I do not think it necessary to make any observations, though the matter is provocative of observation, on the subject of that incongruous, heterogeneous, absurd indorsement which at present stands upon the writ, and which seeks for damages for not having obeyed an injunction of the Court, and several other matters.

Treating this, as I do, as an application founded on a misunderstanding of the 31st Order relating to discovery and inspection, and at variance with the old practice, which I refer to now as furnishing a guide by analogy to the present practice, on reading the 31st Order throughout, I find no pretence whatever for the application which is now made. I find that it cannot have been made for any fair purpose which the Court will countenance, and being an experiment, and one not to be encouraged, the summons must be dismissed, and the Plaintiff must pay the costs of it.

I ought to say that *Ley* v. *Marshall* has not the slightest application to the case before me.

Solicitor for Plaintiff: *Thomas Alley Jones.*

Solicitors for Defendants: *Torr & Co.; G. B. Wheeler; M. Bradford.*

V.-C. B.
1876
Feb. 9.

EYRE *v.* HUGHES.

[1874 E. 55.]

Mortgage—Mortgagee in Possession—Solicitor—Account—Wilful Default—Allowances—Commission on Receipt of Rents—Judicature Act, 1873, s. 24 (2)—*Rules of Court*, 1875, *Order* XIX., *r.* 3.

Stipulations for commission on receipt of rents and conversion of arrears of interest into principal inserted by a solicitor mortgagee in a mortgage deed prepared by himself, and insisted upon by him as the condition of any further advance to his client, will not be allowed in taking the account between the solicitor, as mortgagee in possession, and his client in a foreclosure suit.

Upon a proper case for opening signed accounts made by a mortgagor by his answer and evidence in a foreclosure suit in issue before the 2nd of November, 1875, the Court has power, under the *Judicature Act*, 1873, s. 24 (2, 3), to entertain this equitable defence in the same manner as if a cross bill, or, under the new procedure, a counter claim, had been filed for the purpose.

Form of the account directed in such a case.

Statement.

THIS was a mortgagee's suit, praying an account and payment of what was due for principal and interest on certain indentures of mortgage and transfer of leasehold premises at *Hackney* (the Plaintiff submitting to account for all moneys received by him, and to account as mortgagee in possession of the mortgaged premises, without prejudice to the provisions contained in an indenture of the 28th of February, 1871, for his protection and benefit, or to his rights in respect thereof), and of what was due to the Plaintiff for purchase-money, commission, interest, costs, and charges in respect of his purchase of the reversion of the leaseholds; the Plaintiff submitting to account for the rents received by him since he had had possession thereof; and in default of payment, praying a foreclosure of the equity of redemption in the mortgaged premises and of all right to the benefit of the purchase by the Plaintiff of the freehold and reversion of the leasehold premises.

The Defendant submitted that the accounts ought to be taken against the Plaintiff as mortgagee in possession on the footing of wilful default; that no commission or other profit or benefit attempted by him to be stipulated for in addition to his principal,

interest, and costs, ought to be allowed to the Plaintiff in taking the account; and that all sums claimed by him in respect of costs ought to be taxed, and in all cases where he had acted as his own solicitor, costs out of pocket only ought to be allowed.

The mortgage transactions in respect of which the bill was filed arose out of advances which were made from time to time by the Plaintiff, a solicitor, and *Pinniger*, his cashier, to enable the Defendant *Hughes* to carry on certain building operations at *Hackney*, under an agreement for a building lease to be granted to him on advantageous terms by the ground landlord, Mr. *Tyssen Amhurst*. The agreement for a lease was in March, 1867, and shortly afterwards *Hughes* was introduced to *Pinniger*, who undertook to furnish the necessary capital at 10 per cent. until the leases were granted, and 6 per cent. afterwards, upon the security of the building agreement and of the premises therein comprised. In September, 1867, *William Thomas*, who was father-in-law of *Hughes* and a client of the Plaintiff, was induced by *Pinniger*, with the sanction of the Plaintiff, who really advanced the moneys, using the name of *Pinniger* in the transaction, to join *Hughes* in an arrangement for building and completing the houses as a joint speculation, in which they were to be assisted with capital provided by the Plaintiff and *Pinniger*.

In October, 1867, three of the intended houses having been covered in, a lease of them was granted to *Hughes* by Mr. *Tyssen Amhurst*, and *Hughes* assigned his interest in the property to *Thomas* and himself.

On the 13th of December, 1867, *Hughes* executed a mortgage of three houses to secure £1004 17*s.* 2*d.* and an arrear of interest recited to be then owing to *Pinniger*. On the same day an agreement in the form of a letter signed by *Hughes* and *Thomas* was entered into, by which, in consideration of the reduction of the rate of interest to 6 per cent., it was agreed that *Pinniger* (whose name was used for the Plaintiff) and *Thomas* should each take three-eighths of the profits of the building speculation, and *Hughes* two-eighths. *Hughes* and *Thomas* stated that they considered these terms very onerous, but as they were under the necessity of applying to the Plaintiff for further advances, and he and *Pinniger* promised in return to "finance" the building throughout, they

V.-C. B.
1876
EYRE
v.
HUGHES.
Statement.

were compelled to submit. Further advances were made from time to time, and in March, 1869, a loan of £2000 from a Mrs. *Bailey* was negotiated by the Plaintiff for *Hughes* and *Thomas*. This money was received by the Plaintiff, and they were credited with the amount in reduction of the Plaintiff's bill of costs and interest, and a portion of the principal on the securities. At this time, after giving them credit for Mrs. *Bailey's* £2000, a sum of £3130 18*s*. was stated to be still owing to the Plaintiff and *Pinniger*, and further advances were required by *Hughes* and *Thomas* for completing the houses already built and erecting the others contracted to be built. Accounts shewing this amount of £3130 to be due were produced by *Pinniger* under the Plaintiff's direction, and submitted to the Defendants for their signature. The Defendants, under pressure, as they alleged, and as the only means of obtaining from the Plaintiff any further advance, signed the accounts. At this time *Thomas* was also entitled, under certain building leases for ninety-nine years, to property at *Brompton*, subject to mortgages which he had created. In February, 1871, and for some time previously, the Plaintiff had been in receipt of the rents of the *Brompton* property as mortgagee in possession. In addition to the advances made by the Plaintiff in the name of *Pinniger*, he had been in the habit of making advances to *Thomas* to enable him to carry on his building business. According to the statement in the bill these advances were usually made upon bills of exchange drawn by *Hughes* and accepted by *Thomas*, and the bills were discounted by the Plaintiff at the rate of 1*s*. in the pound commission on bills having three months to run. In some cases *Thomas* signed an I.O.U. for the amount, and sometimes no security was given; but generally a letter or memorandum was given in addition, agreeing to charge the interests of *Thomas* and *Hughes* in the *Brompton* and *Hackney* properties, and to execute a legal mortgage when required. And while such advances were in the course of being made it was agreed in writing that all the advances made, or which should afterwards be made, by the Plaintiff to *Thomas* should be charged upon their interests in the above-named properties. *Thomas* and *Hughes* being in many instances unable to meet the bills at maturity, the "Plaintiff, at considerable inconvenience, was obliged to provide for payment of them, and, with the consent of *Thomas* and *Hughes*,

he charged a further commission of 5 per cent. for so doing." In February, 1871, the Plaintiff had thus advanced to *Thomas* £4624 7*s.* 3*d.*, and requested him and *Hughes* to execute to him a legal mortgage according to their agreement, interest at 7 per cent., reducible on punctual payment to 6 per cent.

Before the mortgages of February, 1871 were executed, an account of the advances was prepared by the Plaintiff, which, after giving credit for all moneys received on behalf of *William Thomas*, and charging him with the advances, interest, and commission, and also with a bill of costs for professional services of £57 17*s.* 3*d.*, shewed the amount due to the Plaintiff to be £4521 6*s.* The bill alleged—but this was denied by the Defendants—that the account was fully examined and investigated by *Hughes* and *Thomas*, and full explanations given to them respecting the same before they executed the mortgages of February, 1871; and as the Plaintiff distinctly refused to advance more money unless the deeds were executed by *Hughes* and *Thomas*, they ultimately agreed to execute, and did execute, the mortgages. It was at the same time agreed that the mortgage deeds should contain special provisions to protect the Plaintiff from liability to account for the rents received by him and in respect of the management of the property as mortgagee in possession, further than as agent for the mortgagors respectively, and to empower him to receive for his own use a commission upon the rents as a remuneration for his trouble in receiving them. Under the pressure alleged to have been put upon them by the Plaintiff, and without being able to help themselves, *Hughes* and *Thomas* ultimately agreed to the insertion of these stipulations in the mortgage deeds, which were prepared by the Plaintiff and tendered to them for execution.

By these deeds the respective interests of *Hughes* and *Thomas* in the *Hackney* and *Brompton* property were charged with the £4521 6*s.* shewn by the accounts furnished to be due from them, with interest at 7 per cent., reducible to 6 per cent. on punctual payment. Provisions were contained that the Plaintiff should enter into possession of the mortgaged premises, and out of the rents and profits should, 1, pay the costs of management; 2, retain a commission of 5 per cent. per annum on the gross receipts as a

V.-C. B. 1876 EYRE v. HUGHES. Statement.

remuneration for his trouble in collecting and receiving the rents; 3, retain the interest payable under the mortgage deed. If the rents and profits should prove insufficient for these payments, the Plaintiff might apply them in payment of interest in arrear, and pay the costs of management and outgoings, or so much as the rents should be insufficient to pay, out of his own moneys, and add the amount so paid and the unsatisfied commission to the principal, bearing interest accordingly. Subject as aforesaid, the rents and profits were to be applied in satisfaction of the principal owing on these indentures, or any of the prior incumbrances. And no further liability than that of an agent was to be imposed upon the Plaintiff with regard to the collection of the rents or the management of the property.

It appeared that, in order to protect the *Hackney* property from forfeiture on account of breaches of covenant which had been committed under the building leases, negotiations were entered into by the Plainitff, on behalf of the Defendants, with the lessor with a view to purchasing the reversion. It was arranged that the Plaintiff should advance the money and complete the purchase in his own name, and giving the Defendants the benefit thereof on having the purchase-money secured by a mortgage in fee of the reversion. Accordingly, in June, 1873, the reversion was purchased by the Plaintiff, who claimed to add to the purchase-money his costs of investigating the title and professional charges relating thereto.

In the meantime *Thomas* had filed a liquidation petition; and on the 26th of February, 1872, the Defendant *Alfred Roslinge* was, by resolution of the creditors, appointed trustee under the liquidation. Some further advances were made to *Hughes* by the Plaintiff upon the usual terms, and the balance ultimately claimed by the Plaintiff at the time of filing the bill in July, 1874, was £9073 12*s*.

Some correspondence had taken place with a view to settling the balance claimed to be due upon the several mortgages, and in the course of the correspondence some errors in the accounts were admitted on behalf of the Plaintiff, and offered to be rectified.

The Defendants *Hughes* and *Roslinge* (as liquidator of *Thomas*) did not dispute the execution of the mortgage deeds, but sub-

mitted that in any case the account ought to be taken against the Plaintiff as against a mortgagee in possession; and that, under the circumstances of pressure, want of opportunity for examining the accounts, and having regard to the position of the Plaintiff as mortgagee and also their solicitor, they were entitled to re-open the signed accounts, and to have the bills of costs which were included in the securities taxed; and also that the Plaintiff ought to be disallowed all sums charged by him under the provisions of the mortgage deeds, February, 1871, for commission on account of the rents, for interest on arrears, and for management of the estate.

Statement.

The effect of the evidence, which was voluminous and conflicting, is stated in the judgment.

Fry, Q.C., and *Millar*, for the Plaintiff:—

Argument.

1. The question is, whether the accounts in this foreclosure suit are to be taken on the usual footing, or whether the Defendants, who have not filed a cross bill, are entitled upon averments in their answers of error, pressure, and something amounting to fraud, to open signed accounts as if there had been a cross bill. It is the clearly established rule that no such relief can be obtained by a Defendant without filing a cross bill for the purpose: *Richards* v. *Bayly* (1); and since the *Judicature Act*, 1873, although an actual cross bill is no longer necessary, this equitable defence, the benefit of which is introduced into the Common Law as well as the Chancery Divisions of the High Court, must be distinctly raised by counter-claim, which has been substituted for the proceeding by a cross bill: s. 24, sub-s. 2; Rules of Court, 1875, Order XIX., r. 3.

2. Upon the merits, the Defendants have not alleged, still less proved, any case sufficient, even if they had filed a cross bill or counter-claim, for opening these accounts. There is nothing special in these agreements entered into between the Plaintiff and *Hughes* and *Thomas* to enable them to carry out their building speculations. They were under no pressure beyond what was, from the nature of their trade and position, put by *Hughes* and *Thomas*

(1) 1 J. & Lat. 120.

V.-C. B. 1876 EYRE v. HUGHES. Argument.

upon themselves. They might have obtained any information as to, and had full opportunity of investigating, the accounts before signing them; and the evidence shews that *Hughes* at least was not a person likely to be subjected to pressure. In order to open a settled account there must be specific averment and specific evidence of overcharges so gross as to amount to fraud, and the relation of solicitor and client is not enough to induce the Court to open the account upon a mere general averment, without proof of fraud, or specific averment and specific proof of overcharge amounting to fraud: *Blagrave* v. *Routh* (1).

3. As to the footing on which the account is to be taken as against the Plaintiff, his possession under the deeds of February, 1871, was that of agent or bailiff for the purpose of receiving the rents and managing the property, and not that of mortgagee in possession; and, accordingly, since that date he cannot be charged with what he might have received but for his wilful default: *Lord Kensington* v. *Bouverie* (2); and the account must be limited to rents and profits actually received. It will be suggested that the stipulations for the Plaintiff's benefit contained in the deeds of February, 1871, cannot be supported, and in aid of that contention this passage from *Fisher's* Mortgages (3) may be cited: "The mortgagee may agree with the mortgagor for the appointment of a receiver, to be paid by the latter, or may appoint one under the statute (24 & 25 Vict. c. 124); but neither the mortgagee, nor his assignees or executors, nor a trustee for the mortgagor's creditors, can have any allowance for personal care or trouble in receiving the rents of the estate, notwithstanding an agreement with the mortgagor for that purpose, even where before the existence of the present statutory power he might have appointed a receiver." But when the cases cited in support of this proposition, *Bonithon* v. *Hockmore* (4), *French* v. *Bacon* (5), *Godfrey* v. *Watson* (6), *Chambers* v. *Goldwin* (7), *Nicholson* v. *Tutin* (8), are examined, it will be found that the only authority against perfect freedom of contract be-

(1) 2 K. & J. 509; 8 D. M. & G. 620. 3 Jur. N.S. 399.
(2) 7 D. M. & G. 134. 1 Jur. N.S. 517
(3) Vol. ii. p. 890.
(4) 1 Vern. 316.
(5) 2 Atk. 120.
(6) 3 Ibid. 517.
(7) 9 Ves. 254.
(8) 3 K. & J. 159. 3 Jur. N.S. 236.

tween mortgagor and mortgagee consists of certain *dicta* of Lord *Hardwicke* (1), an expression of opinion in 1 Vern. p. 316, and what is said by Lord *Eldon* in *Chambers* v. *Goldwin* (2): "There is nothing unfair, or perhaps illegal, in taking a covenant originally, that if interest is not paid at the end of the year it shall be converted into principal. But this Court will not permit that, as tending to usury, though it is not usury. So a mortgagee cannot stipulate to be receiver of the rents and profits with a commission . . . . But it has been long determined here that, though a mortgagee may stipulate for a receiver to be paid by the mortgagor, and may appoint a bailiff, &c., he cannot himself stipulate for any advantage beyond the interest; and though it seems to make little difference to the mortgagor, who is receiver, yet this Court considers it as tending to usury and oppression, and a collateral advantage, which a man contracting for a loan of money shall not make."

But now that the usury laws have been swept away these observations have lost their force, and the mortgagee may make such stipulations as he pleases for remunerating himself for the trouble of collecting the rents and managing of the estate. We submit, therefore, both upon the question of pleading and upon the merits, that the accounts which have been signed cannot be re-opened, and that the Plaintiff is entitled to the ordinary foreclosure decree.

Kay, Q.C., and *Bury*, for the Defendants *Hughes* and *Roslinge*:—

Upon the question of pleading: Under the new procedure a cross bill has been rendered unnecessary, and is now an improper proceeding: *Judicature Act*, 1873, s. 24, sub-s. 3, Rules of Court, 1875, Order XIX., r. 3; and the power given to all Divisions of the High Court to entertain this species of equitable defence, and, if necessary, to amend the pleadings for that purpose, applies equally to cases in which issue has been joined before the 2nd of November, 1875: *King* v. *Corke* (3). On the pleadings, the Defendants' counter-claim, or case for equitable relief, is sufficiently

(1) 2 Atk. 120; 3 Atk. 517.
(2) 9 Ves. 271.
(2) 1 Ch. D. 57.

V.-C. B. 1876 EYRE v. HUGHES. Argument.

raised to enable the Court to make a complete decree. But if not, then, under the large and benign jurisdiction given by Order XXVII., rule 1, the Court has power to allow the pleadings to be amended at any stage, even at the hearing: *King* v. *Corke* (1).

Upon the merits: Having regard to the helpless position of *Hughes* and *Thomas*, needy builders, without independent advice, and completely in the power of the Plaintiff, who as their solicitor was bound to have protected their interests; having regard also to pressure exercised by him to compel them, as the only means of obtaining any further advance, to sign without investigation the accounts submitted to them, and having regard to the exorbitant rate of interest charged thereon, it is impossible that the accounts signed by them under these circumstances can be treated as settled or binding. Then the provisions that in case of any arrear (not of interest but of commission, for which the mortgagee was not entitled to stipulate) the arrears were to be turned into principal, bearing interest at the same heavy rate, are most exorbitant and oppressive, and cannot be sustained. The rule that a mortgagee in possession, who is in respect of the rents and profits a trustee for the mortgagor of any surplus, cannot, any more than a trustee, make any profit out of the trust, or charge any remuneration for his trouble, *Matthison* v. *Clarke* (2), *Barrett* v. *Hartley* (3), *Nicholson* v. *Tutin* (4), is quite independent of usury or tendency to usury, and rests on the principle that the allowance of such charges "would open the door to imposition and even oppression": *Leith* v. *Irvine* (5). He is entitled to his principal, interest, and costs only, and not to any commission, nor to any allowance for services or loss of time: *Bertrand* v. *Davies* (6).

As this rule, that a person under colour of a mortgage cannot obtain a distinct collateral advantage, has not been rested entirely upon the ground of usury, the principle of the cases is not affected by the repeal of the Usury Laws under 31 Vict. c. 4: *Broad* v. *Selfe* (7); and in any case the jurisdiction of the Court to prevent any oppressive bargain, or any advantage exacted from

(1) 1 Ch. D. 57.
(2) 3 Drew. 3.
(3) Law Rep. 2 Eq. 789.
(4) 3 K. & J. 159.
(5) 1 My. & K. 277.
(6) 31 Beav. 429.
(7) 9 Jur. (N.S.) 885.

a man under grievous necessity and want of money from prevailing against him, remains unaffected: *Barrett* v. *Hartley* (1); *Croft* v. *Graham* (2); *Earl of Aylesford* v. *Morris* (3).

There being in this case the relation of solicitor and client as well as that of mortgagor and mortgagee, the ordinary rule that some specific error must be charged in the pleadings and proved at the hearing to entitle the party to surcharge and falsify, does not apply, and upon a mere general allegation that the accounts are erroneous the accounts will be opened if sufficient cause be otherwise shewn: *Lawless* v. *Mansfield* (4); *Davies* v. *Parry* (5); *Morgan* v. *Higgins* (6), correcting upon this point the observations of Vice-Chancellor *Wood* in *Blagrave* v. *Routh* (7).

Upon the whole case, we submit that the Plaintiff is not entitled to have the account taken in this foreclosure suit except on the terms of having the accounts of the whole of the transactions between himself and the Defendants re-opened, and that it is open to the Defendants to obtain this relief both under the old and the new practice, without being compelled to file a cross bill.

Fry, in reply.

BACON, V.C.:—

The most, or perhaps not the least, important part of this case raises a point which must be decided under the recent *Judicature Act*, viz., the argument that the Defendant's case cannot be entertained in this Court because he has not filed a cross bill, or something in the nature of a cross bill. Now the statute is plain. Sect. 24, sub-s. 2 is as follows:—[His Lordship read the section.] Nothing could be more comprehensive, general, and universal than that stipulation. It shall be the duty of the Court, in deciding a cause between two parties litigant, or more than two parties, if a ground of defence or title to relief by way of defence is alleged by the Defendant, to deal with it in the same manner as the Court of Chancery would have dealt with it. But it is said that the

(1) Law Rep. 2 Eq. 789.
(2) 2 D. J. & S. 155.
(3) Law Rep. 8 Ch. 484.
(4) 1 D. & War. 557.
(5) 1 Giff. 174.
(6) Ibid. 270.
(7) 2 K. & J. 509.

V.-C. B. 1876 EYRE v. HUGHES. Judgment.

Court of Chancery would not have dealt with this unless there had been a cross bill filed. The subsequent provisions, which point out the way in which a Defendant having a title to relief may bring that forward by way of counter-claim and so on, need not be further referred to; but it becomes necessary to examine the pleadings of the cause to see whether, in the terms of the sub-section, there is such a defence or such a title to relief by way of defence upon the record as compels the Court to deal with it upon the principles familiar in this Court. The Defendants, who were builders, first *Hughes* alone, and afterwards *Hughes* and *Thomas*, engaged together in building speculations, and the result of their first introduction was that *Pinniger*, having lent some of his own money and some of the Plaintiff's money, lent more, and from time to time mortgages were executed. Beyond question the relation of solicitor and client existed between the Plaintiff and *Hughes* and *Thomas*, if not from the beginning, at least early, or near enough to the beginning, so as to influence the whole of these transactions.

Mortgages were executed; more money was wanted; more money was raised by mortgage, not to the Plaintiff, but the Plaintiff, as he says in his bill, received the proceeds of that mortgage money. I speak of the mortgage to Mrs. *Bailey*. The bill alleges that the £2000 has been applied by the Plaintiff in the payment off, so far as it would go, of the moneys due to the Plaintiff in respect of his bills of costs and the principal and interest on the aforesaid securities. Without deeming it necessary for this purpose to enumerate them all, there were several other mortgages of the like kind, upon which the Plaintiff says in the same terms he received the mortgage money, carried it into his account, and applied it in the same manner as I have first mentioned. In fact the phrase is repeated. So that, not only the relation of solicitor and client existed between these parties, but a sort of relation something like that of a banker. The Plaintiff received the moneys resulting from the Defendant's mortgage, carried them into account, and applied them in payment of the moneys he had advanced and of his bills of costs. That pervades the whole of this transaction, and the relationship is never in any degree changed.

Now, without putting upon the Plaintiff because he is a solicitor any further burthen than properly belongs to any person who so acted, I cannot forget that he had the duties of a solicitor to discharge to those persons. It was his duty to advise them, and it was his duty, and no doubt he discharged it punctually, to see that if they executed mortgages to other persons they did not enter into any other engagement than the transaction warranted. The mortgages to other persons were all at the rate of 5 per cent.; the mortgages to the Plaintiff were taken at a larger rate of interest, which he had by law a perfect right to exact and take; and his position as solicitor did not interfere with that right in the slightest degree, but that was the fact.

The mortgages go on, accounts are stated which are of this nature: The Plaintiff by his cashier makes out his accounts; *Hughes* and *Thomas* are summoned to examine those accounts; the accounts are laid before them or submitted to them (a variety of expressions are used in the evidence); and ultimately, at the instance of the agent of the Plaintiff, and at his request, *Hughes* and *Thomas* signed memorandums approving of those accounts, and stating that they had examined them. If that was all in the case, no doubt they would be bound by a settled account, just as anybody else who having had a full opportunity of examining an account affixes his name to a memorandum, signifying that he has examined and approved of it, is bound. But I do not find a statement in any part of this evidence that there was any examination of the account further than that the Defendant's approbation was required to the statement of moneys which had been advanced to him. I do not find any allusion of any sort to bills of costs. There are bills of costs amounting, as the Defendant's accountant says—and without adopting it any more than is necessary for this purpose, I must for the present assume it to be right—to £600 odd, of which no bill was ever delivered as far as I know. Nobody has ever said that there was, and there was no examination of those bills. Without insisting too strictly upon what may be called the duty of the solicitor, was not it right that before these Defendants should have been called upon to approve of, or before they were in a situation to examine these accounts, they should have had the bills delivered to them? There is no pretence for saying

V.-C. B.
1876
EYRE
v.
HUGHES.
Judgment.

that they were ever delivered, and the Plaintiff himself says—and this is what the Defendants say was pressure—he says over and over again, that he refused to advance any more money unless they would execute the securities which were tendered to them, the approval of the accounts being a preliminary to the execution of these deeds. That I take to be the clear condition of the case as far as the transactions between the Plaintiff and Defendants were concerned, and that continued down to the execution of the last of the mortgages. Well, then, that being so, I say it was fair, just, and proper, that the bills should be delivered, and that the cashier, or the other persons who prepared the accounts and asked the approval of them, ought in his evidence to have said that that which was represented by bills of costs was drawn to the attention of the Defendants, and if it was not, I am compelled to say that I think the Plaintiff in that instance did not perform properly the duty he had taken upon himself as solicitor of the Defendants. It cannot, I think, be fairly or properly suggested that these bills are not subject to taxation. If subject to taxation, and anything should be reduced from them, it would be apparent that there was an error in the accounts stated. Some errors are admitted, and there is an offer to rectify those errors. But surely, as between these parties, considering their relations, considering the burden upon the one and the duty which was upon the other, it is not unreasonable to say that, although no doubt a large sum of money is due to the Plaintiff in respect of large advances made by him for the benefit of the Defendants, the way in which that amount is to be ascertained, notwithstanding the execution of the deed under the circumstances in evidence, is still open to investigation. That is all that I understand the Defendants ask upon this occasion. They do not dispute the execution of the mortgage deed; they do not dispute the fact of the advances being made; but they say that, on considering the matter, or upon inquiry further into it, they are satisfied that they do not owe him so much as the mortgage deed represents them to be in his debt. But, then, is there any principle upon which I can say that such allegation is not a sufficient title to relief in this Court? In the words of the Act, is there any necessity, or would there have been any necessity, for a cross bill. The mortgages are not disputed, but the only thing that is dis-

puted is the sum mentioned in the mortgage deed as the debt, and for that the Defendants allege such reasons as appear in their answer why they ought to be reconsidered, and why the account ought to be investigated. I should be very reluctant to resort only to my experience, but I think that upon such a statement the Court would unhesitatingly direct the account to be taken. A Defendant would not be precluded from at least an inquiry into that which he said was his just right. Upon the statute, therefore, I am satisfied that I should neglect my duty if I did not attend to that which is alleged by the Defendants by way of defence for the purposes I have mentioned. There is no statement of fraud, no statement of forgery as to the deed, and no reason why the deed should be set aside, and no claim for that to be done. All that the Defendants say is, There are errors in the accounts upon which we signed these deeds, and we desire to have them set right. The Plaintiff, to a certain extent, agrees that there are errors in the accounts, and he does not dispute, as far as I know, that no bill of costs was ever delivered to these parties during the transactions which occupied the few years covered by these several deeds. I think, therefore, that upon the pleadings, notwithstanding the argument that the Court does not give relief except upon a cross bill, that if there had been no *Judicature Act* the Defendants, upon the evidence before me, would have been entitled to have the inquiry which they ask for. Under the *Judicature Act* I have no choice but to say that they are so entitled, and that the account must be taken. Then as to the manner in which the account is to be taken. Much has been said about that stipulation in the last mortgage deed which constitutes the Plaintiff receiver of the rents, and allows him to charge a commission for that purpose. It was truly said that the older decisions on the subject had in view the Usury Laws, and Lord *Eldon's* expression in *Chambers* v. *Goldwin* (1) is that such a stipulation would tend to usury, but he says also that it would be oppressive. If the Court finds from the relation of the parties that one of them has the means of oppressing the other, it would come clearly within the very expression that he uses. It is very true, as has been most ably argued, that if you treat the mortgagee in possession as a trustee, he has a right to stipulate

(1) 9 Ves. 271.

V.-C. B. 1876 EYRE v. HUGHES. Judgment.

for any remuneration that he and the other party may agree upon; so to call him a trustee does not preclude the case. That is not all that has to be considered. Nobody has ever said in express terms that a mortgagee in possession is a trustee; but everybody knows that the ground upon which a mortgagee in possession is charged with the rents which, but for his wilful default, he might have received, is because he has changed his character of mere mortgagee, and has chosen for the time being to become owner.

Referring, then, to the topic which I have before mentioned, viz., the relation of solicitor and client, I must assume that the Plaintiff took upon himself, in this matter of contract, the duty of advising his clients what deeds they should execute. If an independent solicitor had been employed, he would at once have objected to any such stipulation—at least he ought to have done so. And he might have referred to that universal practice among conveyancers in mortgage transactions who, when it is desired to give the mortgagee a power, or at least a control over the receipt of the rents, so deal with the matter as to prevent the mortgagee bargaining for himself for any advantage to be derived. That is carefully prevented by appointing some other person to be receiver, and providing for the remuneration to be paid to that other person; all of which is consistent with the other principles recognised in similar cases, where the mortgagee entering into possession cannot receive the rents with his own hands, and finds it necessary to employ a man for that purpose. That expenditure is allowed in the taking of the account, but that is only allowed because the mortgagee himself derives no personal benefit from that transaction. And when the enormous power which a mortgagee in possession possesses over the mortgaged property is considered, the rule, I think, is founded in perfect justice and good sense, and being, as I have said, universally well known, the stipulation that these Defendants should be burdened with the commission payable to the Plaintiff for his own benefit is one which ought not to have been inserted in the mortgage deed. And as the Plaintiff has never been, at least until the quarrel happened, other than the solicitor and adviser of the Defendants, and ought to have advised them against any such stipulation, unless there was the clearest evidence that the Defendants, knowing what protection

the law gave them, were willing to relinquish that protection, I think the Plaintiff cannot justify that charge. Then, as to the practice which seems to have prevailed, and is stated by the Plaintiff himself in his bill, of charging a very large rate of interest upon the sums which he from time to time advanced. Now, the Usury Laws having been repealed, it is not to be disputed that it was competent for the Plaintiff to demand and exact, and competent for the Defendants to agree, that he should have any rate of interest that he thought fit, but I do not find any such contract in the bill. It is stated that the Plaintiff made advances to *Thomas* upon bills of exchange "which were brought by *Thomas* to be discounted at the rate of 1*s.* in the pound commission on bills having three months to run." This statement leaves it doubtful whether this large rate of discount was proposed by the Plaintiff or by *Thomas*. After describing the other transactions connected with this discounting, the effect of which is that an equitable mortgage or charge was at the same time as the discounting created in favour of the Plaintiff, he says further, that being obliged to provide for payment of the bills, he, "with the consent of *Thomas* and *Hughes*, charged a further commission of 5 per cent. for so doing." I cannot read any authority in that for the charge by the Plaintiff of that rate. It seems that the accounts when produced were disputed by the Defendants. The conveyancing clerk, Mr. *Hatton*, tells them they must settle that with the Plaintiff. They do see the Plaintiff, and then the Plaintiff says that he positively refused to advance any further sum of money unless they would execute the deed, and under these circumstances they did execute the deed. The answer alleges the pressure which I have been mentioning, and that the accounts are erroneous, and it concludes with a passage which has been somewhat canvassed, but which I take to mean that the account shall be taken of what is due to the Plaintiff for principal and interest, that is, for principal moneys advanced, and interest upon such advances, with such costs and charges as shall upon taxation appear to be due, but not interest upon those costs.

I think that there is a sufficient ground of defence, a sufficient title to relief pleaded upon this record. I think I am bound upon the evidence to give effect to that claim; I think that there must

V.-C. B.
1876
EYRE
v.
HUGHES.
Judgment.

be an account properly taken of the moneys advanced by the Plaintiff with interest. I think that the costs which are inserted in the account, and included in the securities, must now be taxed, and that the amount when taxed must be included in the Plaintiff's securities, and there must be a decree of foreclosure for the amount of what, upon this process being gone through, shall appear to be due. In other respects it will be an ordinary foreclosure account.

After some further discussion, in the course of which *Sandon* v. *Hooper* (1) was cited, on the question of an allowance for repairs executed by Plaintiff as mortgagee in possession, the decree was made in the following terms:—

1. Account of principal and interest due to Plaintiff in respect of his advances on the mortgages in the pleadings mentioned, and for his costs of suit, such costs, and also his costs properly incurred in respect of the mortgages, to be taxed.

2. Account of money laid out by Plaintiff in necessary repairs on the mortgaged property, with interest on the sums so laid out at same rate as in the mortgages, adding the amount to Account 1.

3. Account, on the footing of wilful default, of rents and profits received, deducting the amount, with interest at 4 per cent. from the date of receipt, from Accounts 1 and 2.

4. Account of money expended in purchase of the reversion, and in taking the said accounts, signed accounts not to be deemed settled accounts. Usual foreclosure decree.

Solicitors: *G. L. P. Eyre & Co.; Rooks, Kenrick, & Co.; Stoneham & Legge.*

(1) 6 Beav. 246.

THEED *v.* DEBENHAM.

V.-C. B.

1876

[1875 T. 169.]

Feb. 15, 16, 17, 18.

Ancient Lights—Injunction—Angle of 45°*—Metropolis Local Management Acts Amendment Act* (25 & 26 *Vict. c.* 102), *s.* 85.

An ancient light of the Plaintiff, a sculptor, had a north aspect, in a street thirty-one feet wide. Defendants' buildings on the opposite side of the street were, as to part, exactly thirty-one feet high, and as to other part, a little less than that height. They claimed to have a statutory right to raise their buildings to a height which would subtend an angle of 45° measured from a base line level with the centre of the Plaintiff's light:—

Held, that the statutory regulation as to the height of buildings in streets is not to be taken as limiting the right by prescription to ancient lights, but that such right depends upon the degree and amount of obscuration in each particular case.

Hackett v. *Baiss* (1) explained.

Statement.

THE bill was filed on the 21st of September, 1875, by *William Theed*, sculptor, the lessee, for the unexpired residue of a term which had about six years to run, of several rooms or studios at the rear of No. 12, *Henrietta Street, Cavendish Square, Middlesex*, having a back entrance in a narrow street called *Mill Hill Place*, against *William* and *Frank Debenham*, partners, carrying on business as mercers at Nos. 27, 29, and 31, *Wigmore Street*, the back of whose premises also opened into, and was numbered 1 and 2. *Mill Hill Place;* and a notice of motion, dated the 24th of September, having been served on the Defendants, was, by consent, ordered to stand till the 12th of October, on which day an injunction was granted on the usual terms of the Plaintiff undertaking in damages.

On the 2nd of November the bill was amended; and on the 10th of December was re-amended, and, as re-amended, was by *William Theed* and *William Ford*, the ground-lessee for a term of which some thirty-five years were unexpired, under the Duke of *Portland.*

The bill stated that the Defendants intended to raise the height of Nos. 1 and 2 to a certain height above their present elevation;

(1) Law Rep. 20 Eq. 494.

V.-C. B.
1876
THEED
v.
DEBENHAM.
Statement.

that if the Defendants were allowed to do this, there would be a very substantial and material diminution of light to the said premises occupied by the Plaintiff *William Theed;* that in the course of the profession of the Plaintiff *William Theed* as a sculptor, he required not only a direct light, but what is technically termed an under or low light, and which he had hitherto enjoyed; and the bill prayed that the Defendants might be restrained from "erecting or constructing, or allowing to be erected or constructed, any building at, upon, or instead of, the said premises, Nos. 1 and 2, *Mill Hill Place,* and from altering the same premises, so as to darken, hinder, or obstruct the free access of light and air to the Plaintiffs' said premises on the opposite side of *Mill Hill Place* aforesaid, as such access was enjoyed by means of ancient lights previously to the 20th day of September, 1875."

The Defendants, by their answer, admitted that they were about to carry their buildings to the height stated in the bill; and they disputed the statements that there would be any substantial or material diminution of light to the Plaintiffs' premises, and that the Plaintiff *William Theed* would be thereby prevented from carrying on his profession as a sculptor, or otherwise suffer any loss or injury.

The issues of fact were supported on either side by a considerable body of evidence, and many of the witnesses were cross-examined in Court, with the results appearing in the judgment.

A point of law was raised which turned upon the distance from each other and height of the respective buildings. It was admitted that the breadth of *Mill Hill Place,* from wall to wall, was 31 feet; the height of the Defendants' old building, No. 1, was 29 ft. 3 in., and of No. 2, 31 feet, from the foot pavement to the parapet. The Defendants intended to raise their new buildings so that their new parapet would be 38 feet from the pavement, and their new ridge of roof about seven feet above the new parapet.

The centre of Mr. *Theed's* studio window was about thirteen feet above the pavement.

The Plaintiffs' lights were all ancient; but their windows had been enlarged within twenty years from the filing of the bill.

Sir *H. Jackson*, Q.C., and *Byrne*, for the Plaintiffs:—

For the operations of sculpture a clear, uninterrupted, horizontal light is necessary; a vertical light is not sufficient. A north light is also preferable to any other.

The eaves of the present building of the Defendants are just as high as the width of the street, that is to say, Mr. *Theed* has an angle of 45°.

An ancient light is to be protected, subject to this, that the Court will not interfere where the injury is trivial; it will interfere only where there is substantial injury. The law is established by the following authorities: *Dent* v. *Auction Mart Company* (1); *Tapling* v. *Jones* (2); *Heath* v. *Bucknall* (3); *Aynesley* v. *Glover* (4).

Kay, Q.C., *Lumley Smith*, and *Borthwick*, for the Defendants:—

Only a small portion of Mr. *Theed's* light is ancient. Mr. *Theed* can claim no more as a sculptor than an ordinary person can claim. *Yates* v. *Jack* (5); he cannot enlarge his right by using his premises, which were formerly a stable and coachhouse, as a studio: *Kelk* v. *Pearson* (6).

The right is to such an amount of light as is wanted for the comfortable use and enjoyment of the property: *City of London Brewery Company* v. *Tennant* (7).

A covenant for quiet enjoyment accompanying a grant of lights conveys no greater or other right in equity than the covenantee would have at law: *Leech* v. *Schweder* (8).

The doctrine of *Clarke* v. *Clark* (9), supposed to have been exploded, has to a great extent been supported since: *Kelk* v. *Pearson* (10).

The rule as to 45° was adopted by the Master of the Rolls in *Hackett* v. *Baiss* (11). We claim a right to build to 45°, measured, not from the street as a base line, but from a horizontal line

(1) Law Rep. 2 Eq. 238, 254.
(2) 11 H. L. C. 290. 11 Jur. N.S. 309
(3) Law Rep. 8 Eq. 1.
(4) Ibid. 10 Ch. 283.
(5) Ibid. 1 Ch. 295, 298. 12 Jur. N.S. 366.
(6) Law Rep. 6 Ch. 809, 812.
(7) Ibid. 9 Ch. 212.
(8) Ibid. 463.
(9) Ibid. 1 Ch. 16. 11 Jur. N.S. 914
(10) Ibid. 6 Ch. 809, 812.
(11) Law Rep. 20 Eq. 494. 11 & 12 Jur. N.S. 447.

V.-C. B. 1876

THEED v. DEBENHAM.

Argument.

drawn through the centre of Mr. *Theed's* studio window, which, as to part only, was one of the ancient lights.

Sir *H. Jackson*, in reply.

[In answer to an inquiry by the Court, it was stated that the statutory rule as to the angle of 45° is to be found in sect. 85 of the *Metropolis Local Management Acts Amendment Act* (25 & 26 Vict. c. 102) (1), passed on the 7th of August, 1862; and in a bye-law (2), issued under Parliamentary authority by the Metropolitan Board of Works.]

(1) The section is as follows:—

"No building, except a church or chapel, shall be erected, on the side of any new street of a less width than fifty feet, which shall exceed in height the distance from the external wall or front of such building to the opposite side of such street, without the consent in writing of the Metropolitan Board of Works, nor shall the height of any building so erected be at any time subsequently increased so as to exceed such distance without such consent, and in determining the height of such building the measurement shall be taken from the level of the centre of the street immediately opposite the building up to the parapet or eaves of such building . . ."

(2) The following copy of the bye-law, which was mentioned in the course of the argument, but was not in evidence in the suit, and is out of print, has been furnished to the reporter by the courtesy of the solicitors for the Plaintiffs.

After reciting that the bye-law was made by the Metropolitan Board of Works on the 29th of February, 1856, and confirmed at a subsequent meeting of the 28th of March, in pursuance of the powers vested in the Board by the *Metropolis Local Management Act* (18 & 19 Vict. c. 120, ss. 202, 203), it was thereby ordered as follows:—

"Every new street within the limits of the metropolis, as defined by the said Act (excepting any mews), must be of the width of forty feet at the least, but if the buildings fronting any street be more than forty feet high from the level of the street, then such street must be of a width equal at least to the height of the buildings above such level.

"Every alley and every mews within the limits aforesaid must be of the width of twenty feet at the least, but if the buildings fronting any alley or to any mews be more than twenty feet high from the level of the alley or mews, then such alley or mews must be of a width equal at the least to the height of the buildings above such level. And with regard to every such alley, in reference to the entrance thereof, every alley must have two entrances thereto, each being at the least the full width of the alley, and one of the two at the least open from the ground upwards.

"And with regard to both such streets and alleys, the aforesaid width is to be ascertained by measuring (at right angles to the course thereof) from front to front of the buildings on each side of such street or alley.

"The word 'street' to include every square, circus, crescent, street, road, place, row, mews, lane, or place along which carriages can pass, or are intended to pass, and that whether there be or be not in addition to the car-

BACON, V.C., after stating the nature of the complaint made by the bill, and the Defendants' assertion of their right to do what they were doing, continued:—

It is not to be disputed that the Plaintiff Mr. *Theed*, for more than twenty years, has been in the enjoyment of that light which existed up to the time when the Defendants pulled down the buildings in *Mill Hill Place*, the two houses, and altered the third, which is at the corner of *Welbeck Street*.

The Plaintiff had acquired, therefore, a legal right to the enjoyment of that which for so many years he had possessed. That I conceive to be his property—property which no man has a right to take from him—that is to say, a property which this Court has been frequently called upon to protect, and has always protected, excluding only from such cases merely frivolous complaints on the part of the owner of such property—merely captious or unreasonable complaints—because in point of fact some interference has been practised, which, however, did not materially injure him, and of which he could not reasonably complain in a Court of Justice, however displeased he might have been at it. [His Lordship then reviewed the evidence, with the following result:—]

I take it, therefore, that it has been proved that there will be, if the Defendants' buildings are carried up to the height they propose, a serious diminution of the light required by the Plaintiff for the purposes he has mentioned, and which he has hitherto enjoyed; [and after further observations on the test which had been adopted, of raising a screen to the height of the proposed new building, and letting it suddenly fall, whereby, in the judgment of the Court, a very satisfactory illustration of the effect of the proposed change had been afforded, His Lordship continued:—]

Then, as to the contention which has been raised, which

---

riage-way a footway, paved or otherwise.

"The word 'alley' to include any court, alley, passage, or other public place which can be used as a footway only.

"In case of any breach of the regulations contained in this bye-law, the offender shall be liable for each offence to a penalty of forty shillings, and in case of a continuing offence to a further penalty of twenty shillings for each day after notice thereof from the Metropolitan Board of Works."

V.-C. B. 1876 THEED v. DEBENHAM. Judgment.

amounts to this, that in this country one man can say to another, "You have got more light than I think is good for you, therefore I will take some of it away," I apprehend that no case which has been referred to countenances any such suggestion. The evidence of one of the witnesses, Mr. *Eales*, is clear, distinct, and positive upon the subject. Mr. *Eales* has a notion that, if the light is not interfered with to the extent of more than an angle of 45°, the right to obscure one's neighbour's light to that extent is a right which anybody may assert against the owner of any light which is already obscured to a lesser extent. He says in effect: "I can raise my building to this height. My building obscured you to the extent of 30° only before; I will now obscure you to the extent of 45°; that is enough light for you, and with that you must be content." I hope I have not overstated it. I have endeavoured to use Mr. *Eales'* own expressions, "You must submit to it; it is enough; you had more than was good for you before." That is no answer to the Plaintiff's case. No case referred to countenances such a proposition.

The regulation as to the angle of 45° is to be found, I believe, only in that provision of the *Metropolis Local Management Act* in which the width of a street is spoken of, and which of itself, measuring the width of a street and the height of the house, furnishes an angle of 45°. That, be it observed, is from the street, as Mr. *Kerr* said, and if he had not said it, the Act of Parliament has said it; for the statute enacts that "in determining the height of such building the measurement shall be taken from the level of the centre of the street;" and that must be so, because the position of the windows is so different in various buildings, that if you were to search for the point from which to measure your angle of 45°, it would be as various as the buildings to which it would be applied. It is said that the Master of the Rolls on a recent occasion, in *Hackett* v. *Baiss* (1), applied this rule about 45°. This, however, he did not do; on the contrary, he quoted the decision in the *City of London Brewery Company* v. *Tennant* (2), in which Lord *Selborne* said there is no positive rule of law on the subject. The regulation may be an illustration or guide, but rule there is none. It is said that the Master of the

(1) Law Rep. 20 Eq. 494, 497. (2) Law Rep. 9 Ch. 220.

Rolls applied that rule, and applied it by measuring through the middle of the window. No doubt the Master of the Rolls did what was suitable in the case before him, having regard to the arguments addressed to him, but that he laid down any rule of law I am by no means convinced, and I should be very much surprised to find that that was his intention, when I find him at the same time referring to a decision which lays down that there is no rule on the subject. He was deciding what was right between the parties before him, but a positive legal rule he never in any respect laid down.

This is really the whole of the case. The case, in my opinion, is proved on the part of the Plaintiff. He has proved a statutory right to the enjoyment of his light undiminished. It is proved, and, indeed, is confessed by the Defendants, that if they build up to the height which Mr. *Eales* mentions in his depositions, the light will be greatly diminished. In my opinion they have no more right to take away the light which the Plaintiff has been enjoying than they have a right to take away the front wall of his house.

The case, in my opinion, is, therefore, very distinctly proved, and the Plaintiffs are entitled to the injunction they ask for.

His Lordship also gave the Plaintiffs the costs of the suit.

Solicitors for Plaintiffs: *Underwood & Colman.*
Solicitors for Defendants: *Boyce & Ridley.*

V.-C. B.

1876

Feb. 26.

In re WADDELL'S CONTRACT.

Vendor and Purchaser—Liquidation Debtor—Joint and Separate Estates—Resignation of Trustee—Contract by Continuing Trustee for Sale of Realty, part of one of the Separate Estates—Bankruptcy Act, 1869, s. 83, *sub-ss.* 2, 8 —*Bankruptcy Rules*, 1870, *rr.* 285, 307, 308.

Upon a liquidation petition by two partners, two persons were by three several resolutions appointed trustees of the joint estate, and of the two separate estates, respectively. One of the trustees resigned, whereupon the continuing trustee was by a resolution of the joint creditors appointed "sole trustee of the property of the debtors;" but no resolution was passed appointing any one to be trustee of either of the separate estates:—

Held, that the continuing trustee was able to convey real property, part of one of the separate estates, to a purchaser, for all the interest of the debtor at the commencement of the liquidation.

Statement.

ADJOURNED SUMMONS.

On the 22nd of December, 1874, *Robert Henry Wylde* and *Campion Calvert*, carrying on business in partnership as bankers at *Southwell, Notts*, filed a petition in the County Court of *Nottinghamshire*, at *Nottingham*, for liquidation of their affairs by arrangement or composition.

At the first meeting of joint creditors, held on the 29th of January, 1875, a resolution was passed that the affairs of the debtors should be liquidated by arrangement, and not in bankruptcy; and that a subsequent meeting be held for the appointment of a trustee.

A second meeting of joint creditors was held on the 5th of February, 1875, at which a resolution was passed, appointing *James Waddell* and *Richard Milward* trustees.

At meetings of the separate creditors of *Wylde* and *Calvert* respectively, resolutions were, on the 5th of February, 1875, passed, appointing the same persons, *Waddell* and *Milward*, trustees of the separate estates.

Certificates, each bearing date the 9th of February, 1875, of these three appointments, were given by the Registrar.

On the 13th of February, 1875, *Milward*, by a letter addressed to *Waddell*, and headed "*Wylde & Co.*, in liquidation," informed

Waddell that he resigned "the office of trustee in this matter." This letter was certified by the Registrar to have been filed with the proceedings.

At a meeting of the joint creditors, held on the 2nd of March, a resolution was passed that the resignation by *Milward*, "one of the trustees of the property of the debtors," of the office of trustee be accepted; and that "in lieu of the appointment heretofore made in this matter" (*i.e.* the matter of the liquidation resolution) of *Waddell* and *Milward* "as trustees of the property of the debtors, the said *James Waddell* be and is hereby continued and appointed sole trustee of the property of the debtors."

A certificate of this appointment was also given by the Registrar, dated the 5th of March.

No meetings of the separate creditors of *Wylde* or of *Calvert* were held, consequent on the above resignation.

On the 5th of May, *Waddell*, as such sole trustee, caused certain freehold property, part of the separate estate of *Wylde*, to be put up for sale by auction, and *Alfred Tatham* became the purchaser, and entered into a contract for the purchase.

On the 30th of June, the purchaser's solicitors wrote to *Waddell's* solicitor requiring *Milward* to be a party to the conveyance, on the ground that *Milward's* resignation applied only to the joint estate.

On the 21st of October, *Milward* wrote to *Waddell*, saying he had been informed that his resignation of the office of trustee had "been construed to include only the joint estate, and not the separate estates, as I intended it to do, and as I believed it did. If this view is correct, I beg to inform you that I now resign the office of trustee in the liquidation of the separate estate of *Robert Henry Wylde*, and that I have never in any manner acted as such trustee since my resignation as aforesaid, and do not intend so to act."

This letter was also certified by the Registrar to have been filed with the proceedings.

The purchaser's solicitors nevertheless insisted that Mr. *Milward* must formally resign his office as trustee of the separate estate, that his resignation must be accepted by a formal resolution of the separate creditors, and Mr. *Waddell* be appointed sole trustee of the separate estate.

V.-C. B. 1876 *In re* WADDELL'S CONTRACT. Statement.

On the 21st of December, they said they were advised that if the Registrar would give a separate certificate in the matter of the separate estate, to supersede his certificate of the 9th of February, 1875, they might take the conveyance from Mr. *Waddell* alone.

A summons taken out under sect. 9 of the *Vendor and Purchaser Act*, 1874 (37 & 38 Vict. c. 78), on the part of *Waddell*, that with reference to the objection contained in the letter of the 30th of June, 1875, and raised on behalf of the purchaser, it might be declared that *Waddell*, as trustee under the liquidation, "is able to convey" the property comprised in the contract "for all the estate and interest of" *Wylde* at the date of the commencement of the liquidation, was now adjourned into Court.

Argument.

De Gex, Q.C., and *Macnaghten*, for the vendor:—

The choice of trustee of the separate estates is regulated by Rule 285 of the *Bankruptcy Rules*, 1870, which provides that the separate creditors in the event of their determining upon the liquidation of the debtor's estate by arrangement, "shall choose" the same trustee, if any, as has been appointed by the joint creditors.

The purchaser's objection is, that *Waddell* has not been appointed by resolution trustee of the separate estate of *Wylde*. But this objection seems to be disposed of by the decision in *Ex parte Philps, In re Moore* (1), approved in *Ebbs* v. *Boulnois* (2), which establishes that, on the appointment of a trustee by the joint creditors, the separate as well as the joint estate vests in the trustee. So that, upon *Waddell's* appointment as sole trustee, the separate estate of *Wylde* vested in him.

Rule 307 prescribes that where a trustee shall die, a general meeting "may" be summoned, and another trustee "may" be appointed; and Rule 308 provides that the resolution "shall" be registered.

In that part of Rule 285 which relates to the distribution of separate assets, the word "trustee" is used in the singular number.

(1) Law Rep. 19 Eq. 256. (2) Law Rep. 10 Ch. 479, 488.

Little, Q.C., and *W. W. Karslake*, for the purchaser :— Argument.

The question affects the title to real estate.

The cases cited have not much bearing. There is no contest here between the joint and separate creditors as to the appointment of trustee. This is the case of a retiring trustee; and the question is, what does the Act of Parliament require in such a case?

Sect. 83, sub-sect. 2, of the Act of 1869, enacts that "if any vacancy occur in the office of trustee by . . . resignation . . . the creditors in general meeting 'shall' fill up such vacancy," and Forms Nos. 46, 47, 48 are provided for such an emergency.

Here there has been no appointment in substitution, there has been only the appointment of a sole trustee. Unless some different rule is to prevail under the statute than exists in the Chancery Division of the Court, a trustee cannot resign his office, except on the due appointment of some successor: *Wilkinson* v. *Parry* (1); *Adams* v. *Paynter* (2).

The 8th sub-section of sect. 83 of the statute enacts, that "the certificate of appointment of a trustee shall for all purposes . . . be deemed a conveyance . . . of property." But there is nothing in the Act which attributes to the appointment of one continuing trustee in lieu of the appointment of two trustees such an effect as to justify the registration of such a resolution, at least without the sanction of the Court.

The appointment of a trustee dates from the date of the certificate. Where, in place of a retiring trustee, a new trustee is appointed, this rule occasions no difficulty. But here it is difficult to say whether Mr. *Waddell's* appointment dates from the 9th of February or the 5th of March, 1875.

The question is, whether the legal estate has passed out of *Milward*. The purchaser is apprehensive that one moiety of the legal estate is still outstanding in him.

BACON, V.C. :— Judgment.

In my opinion there is no ground whatever for this objection.

The effect of the liquidation petition and of the proceedings

(1) 4 Russ. 272. (2) 1 Coll. 530, 532.

V.-C. B. 1876 *In re* WADDELL'S CONTRACT. Judgment.

which were taken upon it is, that the whole estate, joint and separate, became vested in two trustees as joint tenants. Then one of the two in the very terms of the Act of Parliament, resigned his office, and the other was appointed sole trustee.

An argument has been attempted to be raised on sect. 83, subsect. 2, of the statute, of this kind, that as a vacancy occurred in the office of trustee, it became necessary to appoint some one else to be a trustee along with the continuing trustee who was first appointed. But why could not the trustee who was first appointed fill up the vacancy, if the creditors by resolution desired it, and appointed him to do so?

I am of opinion that everything that was necessary to be done has been done, consistently with the strict terms of the Act of Parliament and with the plain policy of the law, to vest the whole of the estate, joint and separate, in the person who is the vendor in this contract, and that he can make a perfectly good title to the purchaser.

I am told the purchaser is a willing purchaser, and I wish he had been as willing not to rush into a litigation which is idle and unsubstantial. He must pay the costs of the summons which his objection has occasioned.

There will be a declaration in the terms of the summons.

Solicitors: *Lawrance, Plews, & Co.*, agents for *Shilton, Nottingham; J. Elliott Fox*, agent for *Newbald & Falkner, Newark.*

TAYLOR *v.* LAMBERT.

V.-C. B.

1876

March 9.

[1875 T. 1.]

Will—Condition—Legacy charged on real Estate.

The testator, by will, gave to each of his younger sons £1000, "which I charge on my estate at *A.* hereinafter devised to my eldest son, but I direct that the sum shall not be raisable or paid to them respectively until my eldest son shall come into actual possession of the *M.* estate."

The *M.* estate was settled on *F.* for life, remainder to the eldest son of the testator for life, remainder to his issue in tail male.

The eldest son died before *F.*, and without coming into possession of the *M.* estate:—

Held, that the legacies to younger sons were wholly contingent upon the eldest son becoming owner of the *M.* estate; and that as that event had not happened they failed and sank into the residue.

Statement.

SIR *H. J. LAMBERT*, by his will dated the 15th of October, 1857, gave to each of his five younger sons the sum of £1000 each, "and which I charge on my estate at *Aston* hereinafter devised, but I direct that the same shall not be raiseable or paid to them respectively until my eldest son shall come into actual possession of the *Malvern* estate." The testator also gave and devised his capital mansion, called *Aston House*, and all his manors, &c., and real estate in the parish of *Aston Rowant*, or elsewhere in the county of *Oxford*, subject to the payment of the several legacies thereinbefore charged thereon, unto his eldest son *H. E. F. Lambert* (whom he also made his residuary legatee and executor), his heirs and assigns for ever.

Sir *H. J. Lambert* died on the 17th of December, 1858, one of his five younger sons having predeceased him.

At the date of the will the *Malvern* estate was limited to the use of Lady *Emily Foley* during her widowhood, with remainder to the use of Sir *H. J. Lambert* for life, with remainder to his eldest son Sir *H. E. F. Lambert* for life, with remainder to the issue of Sir *H. E. F. Lambert* in tail male.

By indenture of the 28th of March, 1860, the *Aston* estate was conveyed by Sir *H. E. F. Lambert* to the Plaintiff *Thomas Taylor* in fee, £4000 out of the purchase-money being retained by *Taylor*, who covenanted to pay the four legacies when the same should respec-

V.-C. B. 1876 TAYLOR v. LAMBERT. Statement.

tively become payable, and in the meantime to pay interest at £4 per cent. to Sir *H. E. F. Lambert;* and in case the four younger sons should not become entitled to the said several sums of £1000 each, then to pay to the executors of Sir *H. E. F. Lambert,* immediately after the death of Sir *H. E. F. Lambert,* the £4000 and all interest due thereon; and it was thereby declared that the £4000 and the interest payable in respect thereof, until the same should be paid, should be a charge on the *Aston* estate. The Plaintiff also entered into a bond for payment of the £4000.

On the 15th of June, 1872, Sir *H. E. F. Lambert* died without having come into actual possession of the *Malvern* estate as Lady *Emily Foley* was still living.

The executors of Sir *H. E. F. Lambert* called upon the Plaintiff to pay them the £4000, but he was advised that he could not safely pay this sum to them without the concurrence of the legatees. The executors declined to procure the concurrence of the legatees, and did not accept the Plaintiff's offer to pay the money into Court under the *Trustee Relief Act.*

On the 9th of December, 1874, the executors of Sir *H. E. F. Lambert* commenced an action in the Queen's Bench against the Plaintiff, claiming the £4000 and interest alleged to be due upon the bond and covenant in the indenture of the 28th of March, 1860.

The bill was filed for the purpose of ascertaining the persons who, in the events which had happened, were entitled to the £4000 charged on the *Aston* estate, and to restrain further proceedings in the action commenced by Sir *H. E. F. Lambert's* executors.

The question was, whether, as Sir *H. E. F. Lambert,* by dying in Lady *Emily Foley's* lifetime, never came into possession of the *Malvern* estate, the legacies charged on the *Aston* estate failed and were payable to the executors of Sir *H. E. F. Lambert* as residuary legatee of the testator his father; or whether they were still payable on the death or second marriage of Lady *Emily Foley* to the legatees who survived their father or to their representatives.

Argument.

Sir *H. Jackson,* Q.C., and *Macnaghten,* for the Plaintiff, offered to pay the money into Court.

Kay, Q.C., and *Cracknall,* for the executors of Sir *H. E. F. Lambert*:—

Until the eldest son came into actual possession of the *Malvern*

estate the charge on the *Aston* estate was not to be raised, nor did the legacies to the younger sons become payable. That event never happened, as the eldest son died in the lifetime of Lady *Emily Foley*, the tenant for life; and accordingly the legacies, being given upon a contingency which has failed, lapse and sink into the inheritance. Words in a will importing contingency must be construed according to their strict literal meaning, without indulging in speculations as to the supposed intention of the testator: *Holmes* v. *Cradock* (1); *Pearson* v. *Rutter* (2); *Grey* v. *Pearson* (3); *Reed* v. *Braithwaite* (4). In distinction from the rule as to the vesting of legacies payable out of personal estate, a legacy charged on land does not vest before the time appointed for payment: *Powlett* v. *Powlett* (5); *Hawkins* on Wills (6); and as the event upon which payment is to be made has now become impossible the gift fails, and the younger sons are not entitled.

Hemming, Q.C., and *Cecil Russell*, for the legatees:—

A contingency in the time for payment of a legacy given absolutely does not make the legacy itself contingent. This will can only be rendered consistent either by importing into the absolute gift of these legacies the contingency as to the time of payment—which the Court will not do—or by moulding the words of contingency so as to leave untouched the absolute gift. In *Holmes* v. *Cradock* and *Grey* v. *Pearson*, an express condition was attached to the gift, and not, as here, to the time of payment only. Adverbs of time, such as "when" or "until," merely express the period when, for the convenience of the estate, the remainder or gift which has already vested shall take effect in possession: *Boraston's Case* (7); *Luxford* v. *Cheeke* (8); *Dawson* v. *Killett* (9); and do not import contingency into a gift, though the time of payment is apparently made contingent: *Maddison* v. *Chapman* (10); *Pearsall* v. *Simpson* (11); *Underhill* v. *Roden* (before the Master of the Rolls, Feb. 11, 1876). In this case the gift was abso-

(1) 3 Ves. 317.
(2) 3 D. M. & G. 398.
(3) 6 H. L. C. 61.
(4) Law Rep. 11 Eq. 514.
(5) 1 Vern. 204.
(6) Page 234.
(7) 3 Rep. 19 *a*.
(8) 3 Lev. 125.
(9) 1 Bro. C. C. 119.
(10) 4 K. & J. 709; *Jarman* on Wills, vol. i. p. 768.
(11) 15 Ves. 29.

V.-C. B. 1876 — TAYLOR v. LAMBERT. — Argument.

lute in the first instance, payment being merely deferred in substance until the determination of Lady *Emily Foley's* life estate, that the eldest son might not be crippled by having to raise the legacies when he was in possession of the *Aston* estate only, but no condition that the eldest son should survive such determination being imposed. An absolute gift to *A.*, payable at a time which may never arrive, is never read as a gift to *A.* on condition that such time shall arrive, and it would be necessary so to read this gift in order to sustain the claim of the executors.

Begg, in the same interest:—

The postponement of the period for payment does not prevent the immediate vesting of a legacy payable out of personal estate; and in the case of a legacy charged on land, if payment is postponed until an event referable, not to the person of the party to be benefited, but to the circumstances of the estate out of which the legacy is to be paid, the ordinary rule, that legacies charged on land do not vest before the time appointed for payment, will not apply: *Evans* v. *Scott* (1).

So, also, where a legacy has been given to *A.* to be paid to him within six months after he should have fully served out his apprenticeship, it has been been held that the serving out of the apprenticeship was not to be considered as a condition attached to the legacy, for the non-performance whereof the legacy would be forfeited, but only an appointment of the time when the legacy should be paid: *Sidney* v. *Vaughan* (2).

Judgment.

BACON, V.C.:—

The construction of the will is clear, and I cannot make a new will for the testator. He gives the *Aston* estate to his eldest son and charges it with certain legacies. At the same time that he thus gives he qualifies his gift with a condition, that it shall be of no effect unless his eldest son comes into actual possession of the *Malvern* estate. There is no grammatical difficulty. In this case it is not in the first instance an absolute gift. In one sentence and with one breath he says, "I give £4000, but I do not give it unless the

(1) 1 H. L. C. 43. (2) 2 Bro. P. C. (Toml. Ed.) 254.

Malvern estate comes into the actual possession of my eldest son, who is owner of the *Aston* estate." No sum can be raised or become payable until that event happens. I can impute no intention to the testator other than that which he has expressed. No man with any knowledge of the English language could read this will in any other sense than that the gift is wholly conditional on the eldest son becoming owner of the *Malvern* estate, and that then, and not till then, are these legacies charged on the *Aston* estate.

V.-C. B. 1876 TAYLOR v. LAMBERT. Judgment.

Solicitors: *Burton, Yeates, & Hart; Tatham, Proctor, & Co.; Walker & Martineau; Fearon & Coldham.*

CAMPBELL *v.* COMPAGNIE GÉNÉRALE DE BELLEGARDE.

In re COMPAGNIE GÉNÉRALE DE BELLEGARDE.

V.-C. B. 1876 *Feb.* 10.

Winding-up—Official Liquidator—Receiver.

The official liquidator under a winding-up is the receiver of the property of the company appointed by the Court for the benefit of all parties interested; and his right is paramount to that of receivers appointed on behalf of mortgagees of the company between the presentation of the petition and the winding-up order.

Order made on motion by the official liquidator discharging two persons appointed before the winding-up order as receivers of the property of the company in an action by mortgagees commenced after presentation of the winding-up petition.

W.R. D. 728

THIS was a motion by the official liquidator of the *Compagnie Générale de Bellegarde, Limited,* which was being wound up compulsorily under an order of the 15th of January, 1876, to discharge an order of the 11th of January, 1876, in an action against the company commenced after presentation of the petition on which the winding-up order was made, appointing two persons as receivers and managers of the company, and for the appointment of himself as receiver and manager in the place of the persons appointed under the order of the 11th of January. There were also two summonses —one on behalf of the official liquidator to stay proceedings in

Statement.

V.-C. B.

1876

CAMPBELL v. COMPAGNIE GÉNÉRALE DE BELLEGARDE.

In re COMPAGNIE GÉNÉRALE DE BELLEGARDE.

Statement.

the action, the other by the Plaintiffs in the action for leave to proceed.

On the 18th of December, 1875, a petition was presented by a creditor for winding up the company, and on the 15th of January an order for a compulsory winding-up was made.

On the 22nd of December, 1875, *Campbell* and *M'Ewen*, two of the three trustees of a "covering deed," by which the real property of the company was conveyed to them by way of mortgage as a covering security to the holders of debenture bonds issued by the company, commenced a friendly action against the company and the remaining trustee for the purpose of having the trusts of the deed carried into execution under direction of the Court, and to have a receiver and manager appointed.

On the 11th of January, 1876, upon interlocutory application in the action, Messrs. *Callender* and *Boyson* were appointed receivers and managers with the consent of the company.

The Petitioner in the winding-up had no notice or knowledge of the action or the proceedings thereunder until after the 15th of January, 1876, the date of the winding-up order.

On the 18th of January, the official liquidator took out a summons to stay proceedings in the action.

On the 19th of January, the Plaintiffs in the action took out a summons for leave to proceed.

On the 24th of January the official liquidator gave notice of this motion.

Argument.

Sir *H. Jackson*, Q.C., and *A. Terrell*, for the official liquidator:—

The consent of the company to the appointment of *Callender* and *Boyson* as receivers and managers was a nullity, as the commencement of the winding-up and appointment of the official liquidator relate back to the 18th of December, 1875, when the petition was presented; and by the *Companies Act*, 1862, s. 153, no transfer of the property of the company or alteration of the *status* of the members can be made between the commencement of the winding-up and the date of the order, unless by special leave of the Court. As a question of principle, and to save expense, the official liquidator, who represents all interests in the

winding-up, is the proper person to be appointed as receiver: *Perry* v. *Oriental Hotels Company* (1).

Kay, Q.C., and *Renshaw*, for the Plaintiffs in the action, opposed the motion:—

Argument.

The order for the appointment of *Callender* and *Boyson* as receivers and managers was rightly made, and cannot be disturbed, as the winding-up order cannot have the effect of preventing the mortgagees from enforcing their rights against the mortgaged property: *In re St. Cuthbert's Lead Smelting Company* (before the Lords Justices, March 2nd, 1866); *Buckley* on the Companies Acts (2); and in any case the appointment of the official liquidator when made does not, like the winding-up order, date back from the presentation of the petition. *Perry* v. *Oriental Hotels Company* is distinguished, as the bill in that case was not filed until after the making of the winding-up order, and the language of Lord Justice *Giffard* (3) shews that when a receiver has been appointed, though at the instance of a subsequent incumbrancer, the Court will not listen to an application to have some other person appointed in the place of the receiver first appointed, unless such former receiver is objectionable. The Court will exercise its discretion as to interfering with proceedings pending in the branch of the Court in which the winding-up order is made against the company: *Thames Plate Glass Company* v. *Land and Sea Telegraph Construction Company* (4).

Sir *H. Jackson* did not press for a stay of proceedings in the action.

J. Wilkinson, for *Armstrong*, the trustee who had refused to join in the action.

Judgment.

BACON, V.C.:—

No doubt there is a difficulty in this matter, but the principle seems quite clear. The Court itself assumes possession by virtue of the compulsory winding-up order, which takes effect from

(1) Law Rep. 5 Ch. 421.
(2) 2nd Ed., p. 212.
(3) Law Rep. 5 Ch. 423.
(4) Law Rep. 6 Ch. 643; Ibid. 11 Eq. 248.

V.-C. B. 1876

CAMPBELL v. COMPAGNIE GÉNÉRALE DE BELLEGARDE. *In re* COMPAGNIE GÉNÉRALE DE BELLEGARDE.

Judgment.

the day on which the petition is presented; and being in possession, the Court finds it necessary to appoint an officer of the Court for the benefit of all parties. It seems, however, that before the winding-up order was made two other persons were appointed as receivers on behalf of the trustees. The case cannot be regulated only by the principles which relate to mortgagor and mortgagee. If there is any question, that will have to be decided, and for that purpose the suit must go on. But is it within the meaning of the *Companies Act*, 1862, that there should be two sets of receivers for the same purpose? The liquidator is as much a receiver for these mortgagees as the gentlemen named. The expenses would, I dare say, be increased, but the control of the Court would not be diminished.

It cannot be endured that there should be two sets of receivers. If the justice of the case required it, and the rights of the mortgagees were likely to be prejudiced, it would have to be done regardless of expense, but there is no such necessity.

It is better, therefore, and more convenient, that there should be one and not three receivers, and that Mr. *Young*, who has been appointed as liquidator, and who is just as much a trustee and officer of the Court as the two gentlemen that have been appointed, should be the sole receiver. But this order must be made without prejudice to any of the mortgagees' rights, and so that their suit shall not be at all paralysed. They will, I suppose, have liberty to prosecute their suit, but the order appointing the two receivers, which was made before the winding-up order, cannot now be carried further into effect. The paramount authority of the liquidator supersedes the authority of these two receivers, and in my opinion no interest of the mortgagees can be affected by continuing Mr. *Young*, the liquidator, as the sole receiver.

His Lordship added, that it did not seem to him to be necessary to make a formal order appointing the liquidator, Mr. *Young*, receiver in this suit, in the place of the two gentlemen named. As liquidator he had all the powers which receivers had. It would be his duty to keep separate accounts, and that, in the due exercise of his function, not by any direction from the Court.

After some discussion one order was made on the motion and

summonses, discharging the order appointing Messrs. *Callender* and *Boyson*, and appointing Mr. *Young* receiver, without prejudice to the rights of the mortgagees upon their securities.

But though the order was taken in this form, the existing authority of Mr. *Young* to act as receiver, from his appointment as liquidator, was, as his Lordship repeated, expressly recognised.

The Plaintiffs in the action would be allowed their costs of these applications under the winding-up; and the costs of the liquidator's summons must he paid by him out of the estate.

Solicitors: *Elmslie, Forsyth, & Sedgwick; Lawrance, Plews, & Co.*; *Stevens, Wilkinson, & Harries.*

In re LESLIE'S SETTLEMENT TRUSTS.

Settlement of Real Estate—Surplus of Income to be invested in Land to be settled to like Uses—Costs of Draining and New Buildings allowed to Trustees out of Capital.

Trustees of real estate for a term of 1000 years from the day of the death of the settlor, had powers, during a period of certain lives in being and twenty-one years, to manage the estates, and out of the income to keep down charges and incumbrances, and subject thereto to repair, erect new or additional buildings, and generally to "make such outlay for the improvement of" the estates as they should "think fit or conducive to the general benefit of" the estates "or the tenants thereof," and hold the surplus as capital, which was to be laid out in the purchase of lands to be settled to the like uses.

The settlor having died in 1870, the first tenant for life being in possession, and the income being insufficient, after keeping down charges and incumbrances, to pay for repairs, for the cost of new buildings, and generally for improvement of the property, out of capital, the Court allowed payments in draining upon which the tenants paid £5 per cent., and in erecting new buildings.

PETITION.

By a settlement, called the *Slindon* settlement, dated the 22nd of November, 1867, made by the late Colonel *Charles Leslie*, K.H., of the first part, and trustees of the second part, after reciting that the family of the settlor then consisted of his only son, *Charles Stephen Leslie*, and of his son's wife *Jane*, and five infant children,

V.-C. B. 1876 *In re* LESLIE'S SETTLEMENT TRUSTS. Statement.

and that he was desirous of settling his estates as thereinafter mentioned, it was witnessed that the settlor thereby conveyed and appointed the estates comprised in the first schedule thereto to such uses as he should appoint; and subject thereto, to the use of himself for life, without impeachment of waste; remainder to the use of the trustees for a term of 1000 years from the day of his death, without impeachment of waste; subject thereto to the use of the said *Charles Stephen Leslie* for life, remainder to the use of his (the son's) then only son, *Charles Radcliffe Aloysius Leslie*, for life; remainder to the use of the first and other sons of the said *Charles R. A. Leslie* successively in tail male, with divers remainders over. And it was thereby declared that after the death of the settlor, every person, including *Charles Stephen Leslie*, for the time being entitled as tenant for life to the first estate of freehold in the hereditaments, being of full age, should from and after the expiration of twenty-one years from the death of the settlor, if *Charles Stephen Leslie* should so long live, have full power from time to time to cut in due course, and take for his or her own benefit, all copse and underwood, to open and work quarries of stone, sand, chalk, marl, clay, brickearth, or other minerals, not being coal or metallic ores; but save as aforesaid should be impeachable for waste. It was then declared that the trusts of the 1000 years' term were, that the trustees should "from and after the decease of the said *Charles Leslie*, and thenceforth until the expiration of twenty-one years next after the decease of the remainder of all the descendants now living of the said *Charles Leslie's* paternal grandfather, or until the failure, extinction, or destruction of all the estates tail hereby limited in the hereditaments comprised in the said term of 1000 years, whichever shall first happen," manage and improve the timber and other trees and wood, other than copse and underwood, and fell such as ought to be cut, and pay the moneys to arise from the sale thereof, as to one-fourth as income, and as to three-fourths as capital arising from any sale of the real estates; and upon further trust out of the income or by mortgage to raise and pay to *Jane Leslie* during her widowhood an annuity of £300; and to raise and pay to any son of *Charles Stephen Leslie*, who during his father's life should attain twenty-one and be entitled in remainder immediately expectant on his decease to the first

estate for life or in tail male in the hereditaments, during the joint lives of such son and *Charles Stephen Leslie*, an annuity of £500; and subject thereto upon trust, for the term of twenty-one years if *Charles Stephen Leslie* should so long live, to "manage" the hereditaments and receive the income, and cut copse and underwood, and open and work quarries, except of coal and metallic ores, and out of the income to pay and keep down the interest of all gross sums of money charged in the hereditaments, "and generally the annual charge of all incumbrances thereon, and also the costs and expenses of managing the same as aforesaid, and shall also during the said determinable term of twenty-one years, by and out of the said rents and profits, or so much thereof as shall remain after answering the purposes aforesaid, in the first place" pay to *Charles Stephen Leslie* during the said determinable term an annuity of £1500; and subject thereto, in the second place, keep the mansion called *Slindon Hall, Sussex*, "and all stables and outbuildings belonging to the said mansion in good and substantial repair, and generally keep in repair all buildings on the aforesaid hereditaments . . . and which the tenants thereof shall not be bound to repair, and with full power to erect any new or additional messuages or buildings on the said hereditaments and generally to make such outlay for the improvement or amelioration of the said hereditaments as the said trustees or trustee shall think fit or conducive to the general benefit of the said hereditaments or the tenants thereof;" and subject thereto, should appropriate the surplus, if any, and hold the same as capital moneys upon and for the trusts and purposes thereinafter declared concerning the moneys to arise from any sale of the hereditaments. The settlement contained a power of portioning younger sons of *Charles Stephen Leslie* to the extent of £5000, and of portioning each daughter to the amount of £3333 6*s.* 8*d.* The settlement also contained powers enabling the trustees to manage the estates during the minorities of tenants for life or in tail, to grant repairing, building, mining, and other leases, and to sell and exchange, with provision for investing the moneys to arise from any sale or for equality of exchange, in the purchase of lands to be settled to the like uses, but with power for the trustees to apply any of such moneys in discharging any mortgage debt,

V.-C. B.
1876
In re LESLIE'S SETTLEMENT TRUSTS.
Statement.

portion, or other charge or incumbrance affecting the settled estates.

The first schedule comprised hereditaments in *Sussex*, *Gloucester*, and *Northumberland*.

The settlor, Colonel *Charles Leslie*, by his will, dated the 9th of December, 1867, bequeathed the residue of his personal estate as if it had consisted of capital moneys arising from a sale under the power of sale in the settlement.

He died on the 10th of July, 1870.

Charles Stephen Leslie was now tenant for life in possession, with remainder to his first son in tail male. *Jane*, the wife of *Charles Stephen Leslie*, and their five children, namely, *Charles R. A. Leslie*, the eldest son, another son, and three daughters, were living; the children being all under age.

Upon the death of the settlor the trustees went into possession.

By an order dated the 25th of June, 1870, made in the matter of the settlements and will of the late Colonel *Leslie* and of the Trustees Relief Acts, on the petition of the trustees, it was ordered that the Petitioners should, during the term of twenty-one years, if *Charles Stephen Leslie* should so long live, allow to him £500 a year out of the surplus annual income of £1485 15*s.* 2*d.* in respect of the estate comprised in the *Slindon* settlement, and another annuity of £200 under another settlement, *Charles Stephen Leslie* undertaking to superintend and take care of the mansion-house of *Slindon Hall*, and the offices, outbuildings, and grounds thereto belonging, to keep down the rates and taxes, and also to superintend and take care of another mansion.

The executors of the settlor had paid to the trustees of the settlement sums of stock amounting to £6600 9*s.* 5*d.*, and of cash amounting to about £10,473 10*s.*, in respect of his residuary personal estate.

These sums had become reduced to £2400 Consols and £4888 2*s.* 10*d.* New Three per Cents. There was also a sum of £631 14*s.* 2*d.* New Three per Cents, which had been purchased with three-fourths of the net timber moneys.

This petition was presented in the same matters as the former, by the trustees, stating that there never had been any surplus of income for investment; that the income was insufficient, after

V.-C. B.
1876
In re LESLIE'S SETTLEMENT TRUSTS.

paying primary charges, consisting of a mortgage debt of £3000, an annuity of £200 to the settlor's widow, the annuity of £1500 to *Charles Stephen Leslie*, and the annuity of £500 directed to be paid to him by the order of the 25th of June, 1870, to pay for all that had been, and was required to be done, towards the repairs of buildings, erecting new and additional buildings, and generally improving the property as directed by the *Slindon* settlement.

Statement.

The petition stated that, nevertheless, out of the past income, the trustees had expended in the necessary drainage of several of the farms, sums upon which the tenants were liable to pay £5 per cent., amounting together to £2648 9*s.* 8*d.*; and that from the same source the trustees had from time to time expended in and towards the erection of new and additional buildings upon several of the estates sums amounting together to £2457 19*s.* 6*d.*; and that they now found it necessary that further sums should be expended in building to the amount of £1575.

The Petitioners accordingly requested the opinion, advice, or direction of the Court, whether they might, out of the sums of £2400 Consols, £4888 2*s.* 10*d.*, and £631 14*s.* 2*d.* New Three per Cents, standing to the account of capital, raise a sufficient amount to recoup to the income account the sums of £2648 9*s.* 8*d.* and £2457 19*s.* 6*d.* expended for drainage, and in erecting the new and additional buildings before mentioned.

Kay, Q.C., and *J. T. Humphry*, for the petition:—

Argument.

One of the latest authorities is *Drake* v. *Trefusis* (1), in which some of the former decisions are referred to.

We are not expressly within that authority in respect of the sums laid out in drainage; but the outlay in new buildings appears to be clearly authorized.

BACON, V.C.:—

Judgment.

Why not the sums laid out in draining as well? In the ordinary case, the test is, "Is the thing in respect of which the expenditure has been incurred an addition to, or merely an improvement of, the existing estate?"

(1) Law Rep. 10 Ch. 364.

V.-C. B. 1876 *In re* LESLIE'S SETTLEMENT TRUSTS. Judgment.

In this instance I think that these trustees, whose duty it was to act on behalf of the estates as prudent owners would have acted, have acted conformably to their duty, and that they are entitled to be recouped their expenditure out of the capital moneys which are directed by the settlement to be laid out in the purchase of lands to be settled to the same uses.

The Petitioners will be allowed the sums expended for drainage, and in erecting new buildings; and the costs of this application will be provided for out of the same fund.

Solicitors: *Sismey*, for *Arnold, Fooks, & Co., Gravesend.*

V.-C. B. 1876 *March* 14.

HICKLEY *v.* HICKLEY.

[1875 H. 164.]

SAME *v.* SAME.

[1875 H. 247.]

Trustee and Cestui que Trust—Sale of Estate by Trustee—Purchase by the Trustees of the Selling Trustee's Settlement.

H., a devisee in trust for sale under a will, was interested in the proceeds of sale under his marriage settlement, under which the trustees had power to purchase a residence for him and his wife. Part of the estate devised for sale consisted of a dwelling-house, which *H.* and his wife requested their trustees to buy as a residence for them. The trustees accordingly authorized *H.* to buy in their names. *H.* instructed an agent to bid for the house in the name of his trustees up to £8000. He also, as vendor, instructed the auctioneer to fix the reserve bidding, which he did at £6000, *H.* not having informed him that his trustees were prepared to bid up to £8000. The house was bought for the trustees for £7230.

On bill by *cestuis que trust* under the will, who were infants, to have it ascertained whether the sale was for their benefit, and for that purpose to have the property put up for sale again at an upset price:—

Held, that the conduct of *H.* had been regular and legal in all respects; and that the sale could not be set aside; and bill dismissed.

Statement.

IN the year 1858, *Thomas Allen Hickley* married *Laura*, one of the three daughters of the Rev. *William North*, then of *Walton-on-Thames*, and by an indenture of settlement made on the 3rd of April, 1858, shortly before the marriage, a sum of cash, certain

canal shares, and consols, were settled upon trust, after the marriage, to pay the income to *Laura Hickley* for life for her separate use, without anticipation, then to *Thomas A. Hickley* for life, and after the death of the survivor, for the benefit of the children of the marriage, as therein mentioned. The settlement contained a power to the trustees to invest the moneys for the time being subject to the trusts in the purchase of freehold hereditaments, and (unless otherwise directed by *Laura Hickley* by some writing under her hand) to permit *Thomas A. Hickley* and *Laura* his wife to reside in and personally occupy any messuage, lands, tenements, or hereditaments which might have been so purchased, without requiring any rent to be paid for the same during such residence or occupation.

The Rev. *William North* died in 1859, having by will devised certain real estate to the use of two trustees, whom he also appointed executors, of whom his son-in-law, *Thomas Allen Hickley*, was one, and ultimately became the survivor, upon trust to sell, and stand possessed of the proceeds for the benefit of the testator's three daughters and their children and issue, as therein mentioned. Among other things, the testator directed his trustees to pay one-third of the clear moneys to arise from the sale of his trust estates to the trustees of the settlement of the 3rd of April, 1858.

Parts of the real estate were sold, and in May, 1868, *Thomas Allen Hickley* put up the remaining unsold part of the realty for sale in ten lots. Amongst these, lot 3 comprised a dwelling-house, called *Elm Grove*, in which the testator and his family had lived for many years, with pleasure-ground and land attached.

Thomas A. Hickley and his wife were anxious to retain this house in the family, and to reside in it themselves. Accordingly, they requested the trustees of their settlement to purchase *Elm Grove* and the lands adjoining for their occupation.

The trustees acceded to the application, and consented to bid at the sale, but they took no active part themselves in the purchase, but left the conduct of it in the hands of *Thomas A. Hickley*, who was a solicitor, and had acted as solicitor to the testator's estate.

Mr. *Hickley* thereupon requested Mr. *Burnell*, a land surveyor, to act as the agent of the trustees of his settlement, and to purchase lots 3, 4, 5, 6, and 7.

V.-C. B. 1876 HICKLEY v. HICKLEY. SAME v. SAME. Statement.

As the seller of the property, he also employed Mr. *Clark*, an auctioneer, and requested him to fix the reserve prices of each lot. The auctioneer valued lot 3 at £6000, lot 4 at £3500, lot 5 at £750, lot 6 at £300, and lot 7 at £200.

Mr. *Hickley* deposed as follows:—"I was careful not to give Mr. *Clark* the slightest intimation as to the employment of Mr. *Burnell* to buy on behalf of the trustees of the settlement, and I informed Mr. *Clark* that my object in asking him to fix the reserve prices was to secure the getting the best possible price for the whole property; and I believe the reserved prices were fixed accordingly."

"I am not certain whether I informed the said Mr. *Burnell* of the reserved prices, but I think it probable I did; and I authorized him to bid for the trustees to the extent of £8000 for lot 3, and directed him, in case this lot was knocked down to him, to buy lots 4, 5, 6, and 7, at whatever price they would fetch."

Mr. *Burnell* attended the sale, and was declared the purchaser of lot 3 for £7230; of lot 4 for £4000; of lot 5 for £400; of lot 6 for £520; and of lot 7 for £440. Total, £12,590.

This total sum exceeded the funds in the hands of the trustees available for the purchase, and Mr. *Hickley*, out of his own moneys, made up the deficiency. The price of the five lots was thus made up: By the trustees, out of the trust funds derived from their share of the proceeds of the sale £9353 18*s.* 11*d.*; by Mr. *Hickley*, out of his own moneys, £3236 1*s.*1*d.* Total, £12,590.

The bill was filed on the 19th of June, 1875, was amended, and re-amended on the 5th of August, 1875. As re-amended it was a bill by the infant children of the other daughter of the testator, against *Thomas Allen Hickley* and *Laura* his wife, the Plaintiffs' father and mother, the trustees of Mr. and Mrs. *Hickley's* marriage settlement, and Mr. and Mrs. *Hickley's* children, alleging that the Defendant, *Thomas Allen Hickley*, was in fact, "to the extent of the moneys so supplied by him, a purchaser from himself of the said trust property;" and praying for a declaration that the sale was not binding upon the Plaintiffs, and ought to be set aside; and that the premises might be offered for sale under the direction of the Court at such a price and in such manner as the

Court should direct, and the surplus, if any, over and above such price, secured for the benefit of the Plaintiffs and other persons interested in the testator's estate; but if no such surplus should be realized, then for a declaration that it was for the interest of the Plaintiffs that the Defendants, the trustees, should be held to their purchase.

Statement.

On the 27th of October, 1875, the infant children of Mr. and Mrs. *Hickley* filed a cross bill against Mr. and Mrs. *Hickley*, the husband of the other daughter of the testator and his wife, the trustees of Mr. and Mrs. *Hickley's* settlement, and the Plaintiffs in the original suit, praying for a declaration that the purchase was fit and proper, and that the Defendant, *Thomas Allen Hickley*, had no claim on the premises for the said sum of £3236 1*s.* 1*d.* supplied by him as aforesaid, but that the same must be held to have been added by him to the trust funds comprised in the settlement; also for a declaration that the trustees of the settlement held the premises upon the trusts of the settlement free from any claim thereon by any of the Defendants thereto.

Argument.

Hemming, Q.C., and *Cecil Russell*, for the Plaintiffs in the original suit:—

Mr. *Hickley* was as to part of the price himself the purchaser, and this alone invalidates the sale. But apart from this there is the fatal objection that Mr. *Hickley*, a trustee under the will, acting for his own trustees, bought the trust property for the purpose of acquiring a residence for himself and his wife. He told the agent to bid to £8000 for the house, but he did not instruct the auctioneer to fix the reserved price at £8000. Knowing that there was in the market a purchaser willing to bid to that amount, he did not give the estate the benefit of that knowledge, and the house sold for £7230 only. The direction to bid to any amount for lots 4, 5, 6, and 7, was only in case lot 3 should be purchased for £8000. The property has improved, partly by natural increase and partly by outlay; and, the only object being to benefit the infants, the Plaintiffs do not desire to set aside the sale, unless it turns out to have been at an undervalue. What they ask for is an inquiry whether the sale was for the Plaintiffs' benefit, with a direction that the property shall be put up for sale at an upset price, in

V.-C. B. 1876 HICKLEY v. HICKLEY. — SAME v. SAME. — Argument.

order to ascertain this. This was the order made in *Ex parte Hughes* (1).

The law is clear. It will be said that here it is not shewn that the trustee for sale has made an advantage for himself. But this defence is not sufficient, as Lord *Eldon* lays down in *Ex parte James* (2); the principle being that no Court can sufficiently discuss the questions what knowledge the trustee has obtained, and whether he has fairly given the benefit of that knowledge to the *cestuis que trust*. Here we know that Mr. *Hickley* did not tell the auctioneer all he knew, and that the house sold for £770 less than might have been obtained. The observations of Lord *Eldon* (3) have precise application here.

Kay, Q.C., and *Chisholm Batten*, for the Defendant in the original suit, *Thomas A. Hickley* :—

The purchasers in this case were the trustees of the settlement. There was nothing to prevent their buying. There is no allegation that full value was not given.

In *Ex parte James* the bankrupt's estate had been purchased by the solicitor to the commission; and from the argument in *Pooley* v. *Quilter* (4) it would seem that the head-note in *Ex parte James* is erroneous, and that the sale was not set aside.

Here it is admitted that the trustees were the purchasers; there is no allegation that the reserve price was too low; and the result is that a price was given which was higher than any other purchaser would give.

Dicconson v. *Talbot* (5) shews that a tenant for life can buy, the principle being that the circumstance of his being interested does not prevent the trustees from selling to him, provided the terms are advantageous to the estate. Here the best price has been obtained. So, in *Forster* v. *Abraham* (6), it is said there is no authority for the proposition that a tenant for life cannot be appointed one of the trustees of a power of sale.

These cases shew that the rule in question must be kept within reasonable limits. The facts of each case must be brought within

(1) 6 Ves. 616.
(2) 8 Ibid. 337, 348.
(3) Ibid. 346.
(4) 2 De G. & J. 327, 335.
(5) Law Rep. 6 Ch. 32.
(6) Ibid. 17 Eq. 351, 354.

(4 & 5 Jac. 345.

the rule. It must be shewn that the same person was both vendor and purchaser. The utmost that can be made of the facts here is, that Mr. *Hickley* made an advance to the trustees; it was a loan to them, which he might have claimed back, but which he says he is willing to let remain in settlement.

The transaction having been perfectly fair and advantageous to all parties, to set it aside would be an extravagant application of the rule. A purchase by a solicitor from his client will be upheld if it be shewn that the sale to him was as advantageous to the client as if he had used his best endeavours to sell to a stranger: *Spencer* v. *Topham* (1).

Argument.

Bardswell, for the Defendants, the Plaintiffs' father and mother.

Romer, for the Defendants, the trustees of Mr. and Mrs. *Hickley's* settlement.

Hemming, in reply:—

The fact remains that Mr. *Hickley*, when he fixed the reserve price, knew there was somebody willing to give more. The property actually did fetch £770 less than it might have produced. *Ex parte James* (2) shews that a trustee must acquire all the knowledge he can for his *cestuis que trust*, and having acquired, must communicate it.

The reason why a tenant for life may purchase is, that he is not in a fiduciary position. There have been various indulgences allowed to tenants for life in respect of sales, leasing powers, and the like, but they all go on the principle that the tenant for life in such cases is not in a fiduciary position. Mr. *Hickley*, in this instance, was in a fiduciary position, and the sale will be set aside notwithstanding the interests of innocent persons in the purchase: *Huguenin* v. *Baseley* (3).

BACON, V.C.:—

Judgment.

This is one of those cases as to the duties of trustees which strains the principles upon which the Court acts as severely as any I ever heard of.

(1) 22 Beav. 573. (2) 8 Ves. 337. (3) 14 Ves. 273, 289.

2 Jur. N.S. 865.

V.-C. B.
1876
HICKLEY
v.
HICKLEY.
SAME
v.
SAME.
Judgment.

Mr. *Hemming* insists upon the principle, which is a true principle, that where a man's duty and his interest are conflicting, he shall not prefer his interest to his duty. There is no doubt about that. Now apply that principle to this case. What are the plain facts? First of all, Mr. *Hickley's* duty, as a trustee under the will, was to sell. His interest, such as it is, is a contingent reversionary interest under the trusts of the settlement, into which the proceeds of the sale must go. His interest besides that is, that if a house shall be bought, he and his wife may live in it, unless the wife shall otherwise direct. That is the extent of interest that he has.

Now as to discharging his duty, let us see how he has discharged it. He employs a person, who is admitted to have been as well qualified as any who could have been found, to conduct the sale. As a preliminary step, he ascertains from him what is the lowest sum at which the property should be sold, and that is called the reserve price. Having done this, and having thus discharged his duty as a trustee in the most business-like and honest manner that can be suggested, it occurs to him that, having regard to the trusts of the settlement, it would be very desirable for the purposes of the settlement that five lots out of the seven or eight that were advertised for sale should be purchased, and, the trustees having power to purchase, he, acting for the trustees, commissioned an agent to go to the sale and bid up to £8000, if necessary, for a particular lot, and if that should be purchased for £8000, to bid without limit for four of the other lots. That is said to be such a conflict of the trustees' interest with his duty as that the transaction, which was afterwards completed by the signing of the contract, can be set aside. Mr. *Hickley's* conduct as trustee seems to me to be without blemish or blame. It appears to me that no trustee could have discharged his duty better or more faithfully than this gentleman has done. But, because he has a remote interest in the thing sold, it is said that, after the lapse of time which has taken place since 1868, when the sale took place, somebody may come and say that the contract is to be set aside because he did not discharge a certain duty, and the duty which, according to the argument, was imposed upon him was that, after he had made up his mind that

it was worth the trustees' while to buy at any price four out of the five lots, if the fifth should be purchased for £8000, it was his duty to have gone to the auctioneer and told him to alter his reserve bid and put up the lot at £8000. What authority is there for any such duty being cast upon a trustee? What authority, so far as Mr. *Hickley's* interests under the settlement were concerned, is there for saying that he was not justified in helping to acquire the property that was put up for sale? I know of none.

The cases that have been referred to have no sort of resemblance to the present. The case of *Ex parte James* (1) was one of a purchase from a client by a solicitor who, by the very fact of being a solicitor, was disqualified from making the purchase. He having ascertained by a valuation that the property was worth at least £12,000, and the creditors having, at their meeting, resolved that the reserved price should be £10,000, goes and bids for it and gets it for a sum of £12,030. That is a transaction which plainly could not stand. Is that case anything like the present, where a valuation was ascertained in the most practical and business-like manner that could have been resorted to, and the purchaser said he would give more than that for it, and said this in the name of the trustees, his own interest being such as I have described?

I cannot see that the case comes at all within any of the rules which the Court has laid down in the cases that have been referred to. It cannot be questioned that where an interest of some sort and a duty are cast upon the same person, as in the case of a tenant for life, that circumstance alone does not preclude a man from effecting a sale which will be advantageous to his own interest, as in *Forster* v. *Abraham* (2). Now that is in effect the present case. Under these circumstances, I am asked to set aside this sale against the trustees. I very readily admit that, if the trustees have unlawfully possessed themselves of anything, they cannot hold it, however innocent or unconscious they may have been. That is not this case. Here the trustees chose to employ Mr. *Hickley* as their solicitor, and they confided to him the management of their interests and the discharge of their duties. In my opinion, he is proved upon the

(1) 8 Ves. 337.

(2) Law Rep. 17 Eq. 351.

V.-C. B. 1876 HICKLEY v. HICKLEY. SAME v. SAME. Judgment.

evidence to have discharged those duties properly. The trustees are in no degree assailable, according to my view of the case, nor is Mr. *Hickley* in the slightest degree blameable. When it is said he helped out the purchase with his own money, that fact has no sort of bearing upon the case, and is not of the slightest importance. But that is explained in this way, that there was not ready money at hand to pay for the purchase, and he, interested, no doubt, only to the limited extent I have mentioned, and doing nothing but pursuing honestly his own interest, fixed this limit, and advanced the money which was necessary to complete the purchase, and he says now, it is a matter of perfect indifference to him whether the trustees give him back that money or not, or whether it remains subject to the trusts of the settlement—that is a matter between them and him, and nobody has any right to inquire into it or to draw any conclusion from it.

Keeping in mind the strict rules which the Court has laid down respecting the conduct of trustees, or rather to insure the due discharge of the duties of trustees—acting with a sense of that implacable jealousy which the Court always feels and exercises in dealing with the conduct of trustees, I cannot perceive in this case blame or wrong of any sort. The sale produced the very utmost amount of the value of the property. That fact is not questioned. Keeping, therefore, in mind all those rules, I am of opinion that there is no ground whatever for the complaint which these *cestuis que trust* now make against Mr. *Hickley*, the trustee, and that no decree can be made upon this bill.

I am glad to hear that it is a friendly suit: I should have been very sorry to have heard that it was otherwise; but whatever it is, it is my duty to decide the case. I have done that as well as I can, and I must dismiss the first bill, and make a declaration as prayed by the second bill.

Solicitors for Plaintiffs in the original bill: *Wedlake & Letts.*

Solicitors for Defendant, Mr. *Hickley: Clowes, Hickley, & Steward.*

MARSHALL *v.* CROWTHER.

V.-C. H.
1874
Nov. 11.

[1866 M. 39.]

Summons—Chief Clerk's Certificate—Payment of Debts—Payment of Interest on Debts by Tenant for Life.

A tenant for life of real estate, upon which the debts of the testator have been ascertained to be a charge, must keep down all the interest which accrues due.

The principle laid down in *Allhusen* v. *Whittell* (1) applied to real estate. *Greisley* v. *Earl of Chesterfield* (2) not followed.

Statement.

THIS was a summons to vary the Chief Clerk's certificate. The testator had directed that his real estate should be sold and the proceeds applied in aid of his personal estate, but more than a year elapsed before the sale took place. In taking the accounts it was found that the debts of the testator were very considerable. The personal estate was applied first, and it was found to be insufficient to pay all the debts. The proceeds of the real estate were then resorted to, and after all the debts had been satisfied there remained a surplus of such proceeds. The question was whether, in adjusting the rights of the tenant for life and remaindermen, the principle laid down in *Allhusen* v. *Whittell* (1), or that in *Greisley* v. *Earl of Chesterfield* (2) should be followed. The Chief Clerk had followed the decision in *Greisley* v. *Earl of Chesterfield*, and certified that the interest which accrued due on the debts during the first year after the testator's death was payable out of the corpus of the real estate, and that the tenant for life must keep down the interest which accrued subsequently.

Argument.

Lindley, Q.C., and *Hemming*, for the summons, after referring to the cases of *Allhusen* v. *Whittell*, *Greisley* v. *Earl of Chesterfield*, *Barnes* v. *Bond* (3), and *Lambert* v. *Lambert* (4), asked that the accounts might be directed to be taken on the principle laid down in *Allhusen* v. *Whittell*. There was no reason why that rule should not be applied equally to real and personal estate.

(1) Law Rep. 4 Eq. 295.
(2) 13 Beav. 288.
(3) 32 Beav. 653.
(4) Law Rep. 16 Eq. 320.

V.-C. H. 1874 MARSHALL v. CROWTHER. Argument.

Dickinson, Q.C., and *W. W. Cooper*, in support of the certificate, submitted that the decision in the case of *Allhusen* v. *Whittell* (1) had nothing to do with this case, and applied only to personal estate; but that the present was exactly like the case of *Greisley* v. *Earl of Chesterfield* (2), and different from *Allhusen* v. *Whittell*, inasmuch as in that case there was only one fund, whereas in this case there were in effect two funds—the personal estate and the proceeds of the real estate.

Greene, Q.C., and *L. Bird*, and *Colt*, were for the Plaintiff and other parties.

Judgment.

HALL, V.C.:—

I think that this case is governed by the decision in *Allhusen* v. *Whittell*, and that it is impossible to distinguish it from that case. In *Barnes* v. *Bond* (3) there was personal estate, and the real estate was charged, and was to be sold for the purpose mentioned. That is, in my opinion, a stronger case than the one now before me. That principle must be applied and followed in this case. Every tenant for life of real estate must keep down all the interest upon all the debts bearing interest, and which have been ascertained to be a charge upon such estate. That liability is in harmony with the settled principles and rules of this Court. I must therefore direct the Chief Clerk to remodel his certificate upon that principle.

Solicitors: *Thomas White & Sons; Clarke, Woodcock, & Ryland; Cunliffe & Beaumont*; *J. M. Chamberlain*, agent for *J. Crowther Smith, Wolverhampton.*

(1) Law Rep. 4 Eq. 295. (2) 13 Beav. 288.
(3) 32 Beav. 653.

Ex parte NEATH AND BRECON RAILWAY COMPANY.

V.-C. H.
1876
Jan. 21.

Railway Company—Taking Lands—Entry on Deposit and Bond—Condition of Bond—Compensation for Minerals—Lands Clauses Consolidation Act, 1845, ss. 63, 85—*Railways Clauses Consolidation Act*, 1845, ss. 78, 81.

Compensation for minerals, under sects. 78 and 81 of the *Railways Clauses Act*, 1845, is not within the condition of the bond to be given, under sect. 85 of the *Lands Clauses Act*, 1845, by a railway company desirous of entering upon lands before agreement, award, or verdict.

A railway company, being desirous of entering upon and using lands for the purchase of which they had given notice to treat, before agreement come to, award made, or verdict given, made the deposit in the bank, and gave the landowner the bond required by the 85th section of the *Lands Clauses Consolidation Act*, 1845. The company and the landowner afterwards appointed an arbitrator, who was by the terms of the reference to assess the purchase-moneys to be paid by the company in respect of the landowner's interest, and also the compensation for any damage which might have been sustained by him by reason of the execution of the railway and the works thereof, and which by virtue of the special Act, or the *Lands Clauses Consolidation Act*, 1845, the landowner was entitled to claim against the company. The arbitrator by his award found one sum as purchase-money for the lands taken, and another sum as compensation for the execution of the works, and found separately a third sum as compensation in respect of minerals.

Upon petition by the company for payment out of their deposit:—

Held, that the bond given by the railway company did not extend to securing the compensation for the minerals, and that the company, having paid the first two sums awarded, had fully performed the condition of their bond, and were entitled to the return of their deposit without paying or depositing the compensation awarded in respect of the minerals.

PETITION.

Statement.

In March, 1866, the *Swansea Vale and Neath and Brecon Railway Company* (afterwards amalgamated with the *Neath and Brecon Railway Company*), under the powers of their special Act, with which the *Lands Clauses Consolidation Act*, 1845, was incorporated, served upon the *Ystalyfera Iron Company* the usual notice to treat in respect of certain lands required by the railway company, of which the iron company were the lessees and occupiers. The iron company held under their leases lands on each side of the proposed railway, and also the mines and minerals thereunder. Negotiations ensued between the two companies, but

V.-C. H. 1876 *Ex parte* Neath and Brecon Railway Co. Statement.

they failed to agree as to the amount of the purchase-money and compensation to be given for the lands required, and in the month of February, 1871, the railway company, being desirous of exercising the power given by the 85th section of the *Lands Clauses Consolidation Act*, 1845, of entering upon and using the lands required, before agreement come to, award made, or verdict given, obtained the appointment of a surveyor under the provisions of the Act, who determined the value of the interest of the iron company in the lands required by the railway company at £1233. The railway company then, in further pursuance of the Act, deposited this sum in the bank on the 14th of August, 1871, to the account of the iron company, and on the 15th they delivered to the iron company a bond with sureties in the usual form, in the penal sum of £1233, the condition of which was, that if the railway company should at any time pay to the iron company, or deposit in the bank for the benefit of the parties interested, "all such purchase-money and compensation as might, in manner in the *Lands Clauses Consolidation Act*, 1845, provided, be determined to be payable by the railway company in respect of the interest in the lands which the iron company was entitled to or enabled to sell and convey, with interest thereon," from the time of entry until payment or deposit, then the bond should be void.

Immediately after the delivery of the bond, the railway company entered upon and took possession of the lands, and the iron company thereupon filed their bill in Chancery to restrain the railway company from continuing in possession, on the ground, first, that the notice to treat given by the railway company had become inoperative by lapse of time; and, secondly, that if not, such notice was originally invalid, because the provisions of the 16th and 17th sections of the *Lands Clauses Consolidation Act*, 1845, had not been complied with. This bill was dismissed with costs by the Master of the Rolls on the 19th of November, 1873.

In August, 1874, the iron company served upon the railway company a notice requiring them to pay as compensation in respect of the lands in the notice stated to have been damaged and injuriously affected and entered upon and taken, and in respect of their interest therein, the sum of £26,164; and stating that unless

the railway company were willing to pay that sum they desired to have the amount of the compensation settled by arbitration.

The railway company were unwilling to pay this sum, and the parties agreed to submit the question of the compensation to a single arbitrator. A submission in writing was accordingly duly executed on behalf of the parties on the 10th of October, 1874, whereby, after reciting that the railway company had, under the powers of their special Act and the *Lands Clauses Consolidation Act*, 1845, entered into and taken possession of lands therein specified, which belonged to or were claimed by the iron company as lessees under certain leases, at certain rents and royalties therein referred to, and that the railway company had constructed their railway upon or through such lands, and after reciting the notice and claim of the iron company, the two companies appointed *William Adams* "to be the single arbitrator for the purpose of assessing all purchase-moneys to be paid by the railway company to the iron company in respect of the interest of the iron company in the lands so taken and used by the railway company, and also the compensation for any damage which may have been sustained by the iron company by reason of the execution of the said railway and the works thereof, and which, by virtue of the said Acts, or one of them, the iron company are entitled to claim against the railway company."

At the hearing before the arbitrator, the iron company desired him to determine the amount of compensation to be paid to them in respect of minerals, and the railway company objected to his doing so, on the ground that it was not within the terms of the submission. The railway company, however, ultimately consented to his doing so, provided that in making the award the claim in respect of minerals should be separately assessed; both parties admitting that questions of law might arise as to the right of the iron company to recover upon some of the items.

By his award, dated the 5th of April, 1875, the arbitrator awarded to the iron company, first, in respect of their interest in the lands taken, the sum of £100 16*s.*; secondly, as compensation by reason of the execution of the railway and works, the sum of £300; and, by the request of the parties, and separately from his other findings, he assessed the amount of compensation in conse-

V.-C. H. 1876

Ex parte NEATH AND BRECON RAILWAY CO.

Statement.

quence of the iron company being compelled to abstain from working the minerals underneath and adjacent to the railway, in pursuance of the notice to treat, and also compensation in consequence of their being prevented from working under the railway, and being thereby put to increased cost in working the minerals south of the railway, the sum of £1485.

The railway company then called upon the iron company to make out their title, and the iron company furnished them with an abstract of their title to their interest in the lands; but disputes arose between them, the railway company pressing certain requisitions, and offering to pay the two sums first and secondly awarded, and the iron company declining to answer these requisitions unless the railway company were also prepared to pay the £1485 awarded in respect of the minerals. This the railway company refused to do. No conveyance was in consequence executed to the railway company, who ultimately paid into Court the two sums of £100 16*s.* and £300, first and secondly found by the award, and on the 7th of December, 1875, executed a deed-poll under the 77th section of the *Lands Clauses Consolidation Act*, 1845, vesting in themselves all the estate and interest of the iron company in the lands in question.

The iron company then commenced an action in the Exchequer Division of the High Court to recover the full amount awarded to them by the arbitrator, together with the costs of the arbitration; and this action was still pending.

The present petition was presented by the railway company, under the 87th section of the *Lands Clauses Consolidation Act*, 1845, for the payment to them of the money deposited by them before taking possession of the lands; and the question was whether they were entitled to be repaid this money before they had paid the £1485 awarded in respect of the minerals; in other words, whether the latter sum was within the condition of their bond.

Argument.

Dickinson, Q.C., and *Dundas Gardiner*, for the Petitioners:—

The bond given under section 85 of the *Lands Clauses Consolidation Act*, 1845, by a company desirous of entering upon lands before agreement, award, or verdict, is conditioned for payment of all purchase-money and compensation payable in respect of

the lands entered upon, and under the 87th section, upon the condition being fully performed, the company is entitled to have the money deposited repaid to them. We have paid into Court the sums of £100 16*s.* and £300, the purchase-money and compensation awarded in respect of the lands upon which we entered. The condition of our bond, therefore, is fully performed, and when that is done it is incumbent on the Court to order repayment to us, even although there may be questions as to costs and otherwise pending between us and the landowner: *Ex parte Stevens* (1); *Ex parte Great Northern Railway Company* (2); *In re Neath and Brecon Railway Company* (3).

The £1485 claimed by the iron company is the sum awarded to them by the arbitrator on account of their being compelled, as they allege, to abstain from working the minerals under our railway; but it was the surface on which we entered; we never required the minerals, which were not comprised in our deed-poll, and the iron company, moreover, never gave us the formal notice of their intention to work the minerals, required by sections 78 and 79 of the *Railways Clauses Consolidation Act.*

Morgan, Q.C., and *Romer*, for the Iron Company:—

The condition of the Petitioners' bond is not fully performed until they have either paid or deposited the £1485. The iron company are the owners of the lands on each side of, and the subsoil, which is also "land," under the railway, so that they are entitled even under the *Lands Clauses Consolidation Act* to this £1485 as compensation for lands injuriously affected by the execution of the railway company's works. Moreover, in the *Railways Clauses Consolidation Act*, 1845, the provisions of which are, by its 1st section, incorporated with every special Act unless thereby expressly varied or excepted, and which came into operation at the same time as, and must be read together with, the *Lands Clauses Consolidation Act*, 1845, not only are there the clauses as to the working of and compensation for mines comprised in the 78th and following sections, but in sect. 6 it is enacted that the company shall make full compensation for "all damage" by

(1) 2 Ph. 772. (2) 5 Railw. Cas. 269; 16 Sim. 169.
(3) Law Rep. 9 Ch. 263.

V.-C. H. 1876 *Ex parte* Neath and Brecon Railway Co.

Argument.

reason of the exercise of the powers of that or the special Act, or any Act incorporated therewith; which compensation is to be ascertained in manner provided by the *Lands Clauses Consolidation Act.* Again, the *Lands Clauses Consolidation Act,* in sect. 63, directs the arbitrator, in estimating the amount of compensation, to have regard not only to the value of the land, but also to the damage sustained by the landowner by reason of the severing or "otherwise injuriously affecting" his other lands "by the exercise of the powers of that or the special Act, or any Act incorporated therewith." This shews that the arbitrator had power to award the £1485 as compensation for the minerals, and that it must be considered as comprised in the condition of the bond. Moreover, the ascertainment of the compensation under all three Acts was by the agreement of the parties within the terms of the reference, and as the arbitrator has awarded compensation on the ground that the iron company have been compelled to abstain from working their minerals, the railway company cannot object that the formal notices of the intention to work the minerals have not been given under the 78th section of the *Railways Clauses Consolidation Act.* The £1485 was, therefore, properly awarded, and must be paid or deposited before the money deposited by the railway company can be repaid to them.

Judgment.

Hall, V.C.:—

In considering this petition, it is important to have regard to the dates of the different proceedings. The railway company entered into possession on the 15th of August, 1871, and the then state of things was this: They desired to enter upon the lands of the *Ystalyfera Iron Company* for the purpose of constructing their railway. By the *Lands Clauses Act,* 1845, sect. 85, if a railway company is desirous of entering upon and using lands before agreement come to, award made, or verdict given, for the purchase-money or compensation to be paid by them, they can do so, but they must first deposit either the amount of purchase-money or compensation claimed, or the amount determined as the value of the lands, in the manner pointed out in the Act; and they must also enter into a bond in a penal sum, equal to the sum so deposited, conditioned for the payment to the parties interested

in the lands of "all such purchase-money and compensation as may in manner hereinbefore provided be determined to be payable by the promoters in respect of the lands so entered upon," with interest from the time of entry; and the mode of settling the amount of that purchase-money and compensation is provided for by the 76th section.

The bond in this case was given on the 15th of August, 1871, and the question is, what was that bond given for? It is said that, having regard to the provisions of the *Railways Clauses Act*, 1845, it must be taken to be a bond which includes sums payable by way of compensation in respect of minerals under sects. 78 and 81 of that Act; and that the *Railways Clauses Act*, coming into operation at the same time as the *Lands Clauses Consolidation Act*, 1845, has reference to what is dealt with in the latter Act. There is, however, no provision in the *Railways Clauses Consolidation Act* which requires any bond to be given in respect of compensation under sects. 78 and 81.

Those sections have nothing whatever to do with the present question; they have nothing to do with the entry upon and taking possession of land, but have reference to an entirely different subject. They are clauses inserted to meet claims which might arise at any time before, or might arise years after, the completion of the purchase. It is not stated very clearly either on one side or on the other what were the actual facts in this case as regards the landowner's claims in respect of the minerals, but, assuming in the landowner's favour that these claims had arisen before the time when the bond was given and the deposit made, it would not alter my view of the construction of the *Lands Clauses Consolidation Act* as regards the bond. I take it that the bond was given only to secure the purchase-money and compensation in respect of the particular lands which were taken and used by the railway company, and that it was satisfied by the subsequent acts of the railway company as by the *Lands Clauses Consolidation Act* provided. That purchase-money and compensation having been ascertained and paid, the sum deposited as a security or guarantee is now repayable to the company according to the provisions of that Act.

It is said, however, that a different interpretation is to be put

V.-C. H. 1876 *Ex parte* NEATH AND BRECON RAILWAY CO. Judgment.

upon this transaction in consequence of the form of the submission to the arbitrator, and that form seems to have been a matter in dispute between the parties. In my opinion they might very well have included the whole matter in the submission to the same single arbitrator under the two heads of, first, what was to be paid for the land; and, secondly, what was to be payable under the 78th and 81st sections of the *Railways Clauses Consolidation Act.* When the parties came before the arbitrator, it was a matter in dispute between them whether the question as to the minerals was to be taken as included in the submission or not. The parties very sensibly said, "Let that question be included in the award, but let us keep it as a separate question, and when payment of the sum awarded under that head is applied for, then the question as to the right to it will arise." That question is now raised in a litigation which may go on for a long period. But it is said that because the parties made an arrangement before the arbitrator that he should assess compensation in respect of both the land and the minerals, the amount of compensation awarded in respect of the minerals must be taken to be now included in the bond. As I have already intimated, I do not consider that the parties ever intended such compensation to be so included, and I do not think that their having by a subsequent agreement altered the form of the submission, in any way altered their rights and their position in reference to the deposit and bond which had been made and given, and whereby the railway company complied with the Act of Parliament and obtained the right to enter upon and use the land.

That being so, it seems to me that the bond has been satisfied, and that the Petitioners are right in their contention that the money deposited by them is no longer subject to any charge. I shall therefore make an order for the sale and payment out of that deposit to the railway company.

Solicitors for the Railway Company: *Dean & Taylor.*

Solicitors for the Iron Company: *Hacon & Turner,* agents for *C. Norton, Swansea.*

DAY *v.* GUDGEN.

V.-C. H.

1876

Jan. 25.

[1875 D. 72.]

Mortgagor and Mortgagee—Puisne Incumbrancer—Disclaimer—Costs.

Foreclosure bill against mortgagor and second mortgagee. After bill filed the second mortgagee stated that he had been paid off and offered to disclaim at Plaintiff's cost. This was refused, and the second mortgagee filed a disclaimer:—

Held, that he was entitled to his costs.

Statement.

ON the 15th of October, 1856, *Samuel Barber* mortgaged his estate to *Francis Day* to secure £650, and *John Beedham* acted as solicitor in the matter.

On the 23rd of January, 1863, *Barber* mortgaged the same estate to *F. B. Claughton* to secure £68.

On the 15th of July, 1863, *Claughton's* mortgage was transferred to *John Beedham*.

On the 12th of July, 1863, *F. Day* died, and the Plaintiff was his administratrix, and became entitled to the legal estate in the mortgaged property by a vesting order dated the 6th of March, 1874, and made in a suit of *Day* v. *Day*.

On the 18th of December, 1873, *John Beedham* died, and the Defendant *T. C. Beedham*, a solicitor, was, on the 19th of March, 1874, appointed his administrator with the will annexed.

In February, 1874, the Defendant *T. C. Beedham's* solicitor acted as the Plaintiff's solicitor's agent in serving the occupiers of the mortgaged estate with notices and with writs of ejectment.

On the 9th of March, 1874, the Defendant *T. C. Beedham's* solicitor gave notice to the Plaintiff's solicitor of the mortgage of the 23rd of January, 1863, and stated the amount of the principal and five years' and upwards interest due.

In June, 1874, the Defendant *T. C. Beedham* recovered from *Barber*, in an action against him, payment of the money due on his mortgage, but he was not, as the security was equitable, called upon to execute any reconveyance of the property. He never gave any notice of such payment to the Plaintiff or to her solicitor, although there had been a correspondence between his soli-

V.-C. H. 1876 DAY v. GUDGEN. Statement.

citor and the Plaintiff's solicitor down to, and which ended in, June, 1874.

In July, 1874, the mortgaged estate was, by order made in *Day* v. *Day*, offered for sale by auction by *Day's* administratrix under the power of sale, but only one lot was sold, and the proceeds were applied in payment of costs and part payment of mortgage debt and interest, leaving over £300 due.

In December, 1874, the Defendant *Gudgen* was appointed trustee in the liquidation of *Barber's* estate under the *Bankruptcy Act*, 1869.

This bill was filed on the 1st of May, 1875, against *Gudgen* and *T. C. Beedham* for an account of what was due on the mortgage of October, 1856, and for payment or foreclosure.

The Plaintiff's solicitor, on or about the 21st of April, 1875, wrote to the Defendant *T. C. Beedham's* solicitor a letter asking for the name and address of the legal personal representative of *John Beedham*, but he did not give any intimation of any intention on the part of the Plaintiff to file a bill. The reply sent on the 21st of April was:—

"*Barber's* Mortgage.

"Dear Sir,—Mr. *Thomas Claughton Beedham*, of *Kimbolton*, is the administrator with the will annexed of my late father.

"Yours truly,

"*Thos. Sismey*, Esq." "*B. H. Beedham.*

It was in evidence that when *T. C. Beedham's* solicitor's *London* agents were served with a copy of the bill, they, in accordance with his instructions, called upon and made a verbal offer to the Plaintiff's solicitor that *T. C. Beedham* should execute any formal deed of disclaimer, if required, on payment of any costs of it.

On the 15th of May, the Defendant *T. C. Beedham's* solicitor's *London* agents wrote to the Plaintiff's solicitor, offering unconditionally to disclaim by deed any interest in the estate, and to approve the draft of any instrument he might consider necessary. After such offer, *T. C. Beedham* was served with a copy of the annexed bill (dated the 5th of June, 1875,) and interrogatories, which he was required to answer.

By his answer, filed the 30th of July, 1875, *T. C. Beedham*

disclaimed having any interest in the estate, and stated that besides the letter of April, 1875, no further application for information as to his claim of any interest in it was ever made by the Plaintiff or by her solicitor to him, or to any person on his behalf, prior to the institution of this suit; and that, if any such application had been made, he would at once have disclaimed. The Plaintiff's solicitor, in his affidavit, stated that he suggested to *T. C. Beedham's London* agents that he should disclaim, and that he did not accept the offer made on the 15th of May, 1875, because it would have thrown on his client the cost of the disclaimer, which he thought she ought not to bear. It did not appear that the notice of March, 1874, was ever withdrawn.

Statement.

W. W. Karslake, for the Plaintiff:—

Argument.

A statement, before bill filed, by a puisne incumbrancer, that he has been paid off, does not amount to a disclaimer: *Roberts* v. *Hughes* (1); but here the puisne incumbrancer had not given notice that he had been paid off. A disclaiming Defendant is not entitled to subsequent costs unless he offers to have the bill dismissed against him without costs: *Talbot* v. *Kemshead* (2); *Maxwell* v. *Wightwick* (3). A Plaintiff is not bound before filing his bill to ask a Defendant to disclaim: *Ford* v. *Chesterfield* (4); and in this case a reconveyance was necessary, although the Defendant *Beedham* had not the legal estate in him: *Fisher* on Mortgages (5); *Richards* v. *Cooper* (6). The Plaintiff would have been satisfied with a short disclaimer, the costs of which the Defendant *Beedham* ought to have paid, but that he refused to do, and has allowed the case to go on, and under the circumstances he ought not now to be paid any costs.

Everitt, for the Defendant *Beedham*, said that the proper course would have been to ask him whether he had been paid off, and submitted that upon the facts he was improperly and unnecessarily made a party to the suit; and that no reconveyance was necessary to revest the entire equity of redemption in *Barber* or those

(1) Law Rep. 6 Eq. 20.
(2) 4 K. & J. 93.
(3) Law Rep. 3 Eq. 210.
(4) 16 Beav. 516.
(5) Page 1005.
(6) 5 Beav. 304.

V.-C. H. 1876 DAY v. GUDGEN.

claiming under him. If the Plaintiff desired a disclaimer, or the execution of any deed, *Beedham* was not bound to bear any costs or expenses relating thereto; and as he had been made a party to the suit, he was entitled to be paid all his costs.

Argument.

W. W. Karslake, in reply, submitted that the test whether a disclaimer was necessary was whether the Defendant *Beedham* at any time claimed an interest; and it was clear that he did do so, and that he had not mentioned that his debt had been satisfied.

Judgment.

HALL, V.C.:—

I am of opinion that the Defendant *Beedham* is entitled to be paid the ordinary costs. The Plaintiff's contention has been that this Defendant had in the property, which he now seeks to perfect his title to by foreclosure, an interest which he could only get rid of either by a disclaimer or by a conveyance. If there had been no suit, the costs of a disclaimer or a conveyance must have been paid by the party who asked for it, and there being a suit and a disclaimer by the Defendant alleged to have an interest, the Plaintiff must pay the costs of such Defendant.

The Defendant *Beedham* might have told the Plaintiff that he had no interest, or an interest of such a character that it was not necessary that he should be made a party to the suit; but, according to the Plaintiff's contention, she wished to perfect her title, and, at the same time, did not offer to pay the Defendant his costs of a reconveyance, nor offer to pay the costs of a simple disclaimer; and as, according to the Plaintiff's view, it was necessary to make the Defendant *Beedham* a party to the suit, he must be paid his costs of it.

Solicitors: *Sismey; Mead & Daubeny*, agents for *B. H. Beedham, Kimbolton.*

WOLLASTON *v.* BERKELEY.

V.-C. H.
1876
Jan. 25.

[1875 W. 79.]

Marriage Settlement—Reduction into Possession—Deaths at Sea of Husband and Wife—Legal Personal Representatives of each Settlor entitled to the Settled Funds.

By a settlement made on the marriage of *L.* and *G.*, *L.* agreed that he would, after the marriage, transfer to the trustees a sum of consols, and *G.* assigned unto the same trustees some Portuguese bonds. The trustees were to pay the income of the consols to *L.* for life, and after his death to pay it to *G.* for life, and after the death of the survivor, in trust for the children of the marriage, and if none, in trust for the survivor of *L.* and *G.*, his or her executors and administrators. The trustees were to pay the income of the bonds to *L.* during his and *G.'s* joint lives, and in case he should survive, then, after *G.'s* decease, to transfer the bonds to whom she might appoint by will, and in default of appointment, to her next of kin; but if she should survive *L.*, then in trust to transfer the bonds to her, her executors or administrators. After the marriage, the consols were transferred to the trustees. *L.*, by will, gave to his wife the whole of his property absolutely, and *G.* bequeathed the whole of her property to her husband for life, and after his death, to her sisters. Both husband and wife, who left *Liverpool*, in April, 1874, in the *Liberia*, were, with all hands on board, drowned at sea:—

Held, that the funds settled belonged to the legal personal representatives of each settlor.

Statement.

By an indenture of settlement made upon the 4th of July, 1843, on the marriage of the Rev. *Thomas Lowe* and *Catherine Maria Guerin*, it was agreed by the former that he would, after the marriage, transfer into the names of the two trustees, named, a sum of £1500 consols; and the latter thereby assigned unto the same trustees certain Portuguese bonds upon trust to pay the income of the consols to the husband for life, and after his death to pay the same to the wife for life (which she accepted in satisfaction of any dower and freebench), and after the death of the survivor, in trust for the children of the marriage as therein provided and declared; and in case there should be no child of the marriage who should acquire a vested interest in the consols, then in trust for the survivor of the settlors, his or her executors, administrators, and assigns; and it was agreed that the trustees should stand possessed of the bonds upon trust to pay the income unto the husband

V.-C. H. 1876

WOLLASTON v. BERKELEY.

Statement.

during the husband and wife's joint lives, and in case he should survive her, then after her decease to transfer the bonds and the interest (if any) to such persons as she should by will appoint, and in default of appointment, in trust for the persons who at her decease would, under the Statutes of Distribution, have been entitled if she had died unmarried and intestate; but if she should survive her husband, then immediately after his decease upon trust to transfer the bonds unto her, her executors, administrators, and assigns.

The marriage was duly solemnized shortly after the execution of the indenture, and the consols were transferred to the two trustees.

The Rev. *Thomas Lowe*, by his will, dated the 2nd of February, 1865, gave to his wife the whole of his real and personal estate absolutely; and Mrs. *Lowe*, by her will, dated the 5th of April, 1872, bequeathed the whole of her property to her husband for life, and after his decease to her sisters equally, absolutely.

On the 11th of April, 1874, Mr. and Mrs. *Lowe* sailed in the steamship *Liberia* from *Liverpool* for *Madeira*, and since that date neither the ship nor any of the passengers or crew had been heard of. No doubt was entertained by the ship's owners that she had been lost with all hands on board. The underwriters had paid the insurances on the ship and her cargo. There were no children of the marriage. On the 18th of December, 1874, Mr. *Lowe's* will was proved by the surviving executor; and letters of administration with the will annexed of Mrs. *Lowe* were, on the 8th of April, 1875, granted to her next of kin—her three sisters. The surviving trustee of the indenture of settlement was in possession of the trust funds. The Plaintiff—the surviving executor of Mr. *Lowe's* will—prayed that the rights of all parties interested in the settled funds might be ascertained and declared, and that the trusts of the settlement might be carried into execution by the Court, and for consequential relief.

Argument.

Freeman, for the Plaintiff:—

By the settlement there was a reduction into possession of the wife's property. The trusts of the settlement having been exhausted, there was a resulting trust in favour of the husband both

of his own and of his wife's property. There was no presumption who was the survivor.

[HALL, V.C.:—How can it be contended that there was a resulting trust? The settlement was an arrangement between the parties. The trusts having failed, and there being no presumption of survivorship one way or the other, each party retained his or her property brought into settlement.]

The trusts having been exhausted, the property in settlement remained in the husband.

[HALL, V.C.:—As regarded his own property only; as regarded the wife's property, the settlement executed before marriage put it into such a state as that the husband could not reduce it into possession. The wife's interest was reversionary.]

As regarded the wife's property, when the contract for a settlement was entered into the husband's marital rights commenced, and they were completed by the marriage. The same doctrine applied to a post-nuptial as to an ante-nuptial settlement: *Burnham* v. *Bennett* (1). The doctrine as regarded presumption in such a case was fully discussed and clearly stated in *Wing* v. *Angrave* (2). As to the husband's rights, at the time of the settlement the legal interest in the wife's property was in herself, and all that was necessary was to bind the husband. By the settlement he bound his rights only to the extent of giving effect to the settlement, and he did not deprive himself of his marital rights to any greater extent.

[HALL, V.C.:—Was it intended that he should have a marital right?]

The deed spoke for itself. He had a marital right, and only so far as the settlement went, and no further, had he deprived himself of it. The property was his by virtue of the contract, and what was done was equivalent to a reduction into possession: *Cunningham* v. *Antrobus* (3).

[He also referred to *Anonymous* (4).]

Langley, for the wife's legal personal representatives and next

(1) 2 Coll. 254.
(2) 8 H. L. C. 183.
(3) 16 Sim. 436.
(4) 1 Giff. 392.

V.-C. H. 1876 WOLLASTON v. BERKELEY. Argument.

of kin, submitted that letters of administration of her property were properly granted to them: *Re Goods of Elizabeth Wheeler* (1); and the decision in *Wall* v. *Tomlinson* (2) clearly shewed that they were entitled to the wife's property. That view was supported by the decisions in *Langham* v. *Nenny* (3), *Seawen* v. *Blunt* (4), and *Wildman* v. *Wildman* (5). He also referred to *Williams* on Executors (6) and the statute 29 Car. 2, c. 3.

As regarded the husband's consols, the case of *Langham* v. *Nenny* applied.

Freeman, in reply, submitted that there was a conflict in the authorities as to what was a reduction into possession.

R. O. Turner, for the surviving trustee of the settlement.

Judgment.

HALL, V.C.:—

In my opinion it is clear upon the authorities, with the exception of the case of *Anonymous* (7), decided by Vice-Chancellor *Stuart* (and that case was heard in private, and so far as it appears, no case was cited during the argument), that the wife's property which was included in the settlement belongs to her legal personal representatives. All the trusts of the settlement have been exhausted, and there is nothing either in form or in substance which amounts to anything like a reduction into possession by the husband. All that took place between the parties was before and in contemplation of the marriage. Before the husband had any marital right he agreed to a transfer of the wife's property to trustees, and that agreement prevented him from having any right in respect of a reduction into possession. I shall declare that each fund must be paid or transferred by the surviving trustee of the settlement to the legal personal representatives of the settlor by whom the same was brought into settlement.

Solicitors: *Hughes, Hooker, Buttanshaw, & Murton; Chapman, Turner, & Prichard.*

(1) 31 L. J. (Pro.) 40.
(2) 16 Ves. 413.
(3) 3 Ibid. 467.
(4) 7 Ves. 294.
(5) 9 Ibid. 174.
(6) Page 410.
(7) 1 Giff. 392.

BOLTON *v.* BOLTON.

V.-C. H.
1876
Jan. 26.

[1875 B. 61a.]

Practice—Special Examiner—Taking down Depositions—Certificate of Examiner—Rules of Court, 1875, *Order* XXXVII., *r.* 4—15 & 16 *Vict. c.* 86, *s.* 32.

A witness's depositions, *de bene esse*, not taken down by the examiner, specially appointed, in his own handwriting, as directed by the 15 & 16 Vict. c. 86, s. 32, but taken down in the presence of the other parties and certified by the examiner to have been read over to the witness, and signed by her in his presence, were, under Rules of Court, 1875, Order XXXVII., rule 4, ordered to be filed.

Statement.

THIS was an action for the administration of an estate. The Defendant had obtained an order upon summons at Chambers, giving him liberty to examine an aged and infirm witness (residing at *Newcastle-on-Tyne*) on his behalf, *de bene esse*, and appointing a special examiner to take the examination; the Plaintiff to be at liberty to attend the examination, and to cross-examine. The examination took place in the presence of the Plaintiff's solicitor, who cross-examined the witness. The examiner appointed attended, but did not take down the evidence in his own handwriting. He returned the depositions to *London*, with the following certificate at the foot signed by him: "I hereby certify that the evidence contained on this sheet of paper was taken by me and was afterwards read over to the witness and signed by her in the presence of me."

The Records and Writs Clerks refused to file the depositions, on the ground that they had not been "taken down in writing by the examiner," in compliance with the provisions of the 32nd section of 15 & 16 Vict. c. 86 (*Improvement of Jurisdiction of Equity Act*).

Argument.

Oswald, for the Defendant, applied *ex parte* for leave to file the depositions. He submitted that the power given to the Court by the Rules of Court, 1875, Order XXXVII., rule 4, was very wide, and that a discretion was thereby expressly given to the Court to order any depositions to be filed. And that though where the Judicature Acts were silent as to the mode of taking the deposi-

V.-C. H. 1876 BOLTON v. BOLTON. Argument.

tions the old practice remained, as it was ordered under the heading "Rules of Court," that where no other provision is made by the Act or these rules the present procedure and practice remain in force; yet the jurisdiction under which the Court had made the order in this case was new, and gave the Court a large discretion. He also contended that at common law it had not been the practice to direct the depositions on the examination of witnesses within the jurisdiction to be taken down in writing by the examiner himself, but merely to be certified by him; and he referred to *In re Springall and Goldsack's Contract* (before the M. R. Nov. 30, 1875), a case under the *Vendor and Purchaser Act*, 1874, where the Master of the Rolls had, after referring to Rules of Court, 1875, Order XXXVII., rule 4, directed that the evidence of the witness should be taken before the examiner.

Judgment.

HALL, V.C.:—

Considering that the other parties were present, and saw the course of procedure, and did not object, and, also, that the certificate states that the evidence was read over to the witness, I shall order the depositions to be filed.

Solicitor: *George Dixon.*

(1 Ch. Ch. 1875) 325.

V.-C. H. 1876 Feb. 16.

COOK *v.* DEY.

[1876 C. 63.]

Practice—Judicature Acts—Service of Writ—Substituted or other Service—Rules of Court, 1875, *Order* IX., *r.* 2.

The provision for "substitution of notice for service" in the latter part of the 2nd rule of Order IX. of the Rules of Court, 1875, does not apply to an ordinary case of an absconding Defendant within the jurisdiction. In such a case service of the writ was ordered to be effected by leaving a copy of it at the lodgings last occupied by the Defendant and at the place where his business was being carried on; and advertisements were directed to be inserted in the *London Gazette* and the *Times*; but the Court declined to make any special order varying the ordinary eight days' time usually fixed by the writ for the appearance of the Defendant.

Statement.

ONE of the Defendants in this action was a member of a firm of solicitors who had been adjudicated bankrupts and had absconded,

and whose business was being carried on by a receiver appointed in the bankruptcy, assisted by a clerk formerly in the Defendant's employment.

The present address of this Defendant was not known either at the lodgings he had occupied or to his clerk, and could not be ascertained.

Statement.

Pope, for the Plaintiff, moved as to this Defendant under Rules of Court, 1875, Order IX., rule 2, for an order for substituted or other service of the writ, or for the substitution of notice for service, on the ground that, under these circumstances, it sufficiently appeared that the Plaintiff was "unable to effect prompt personal service" upon him, and asked for the direction of the Court as to the time to be fixed in the writ for the appearance of the Defendant.

HALL, V.C.:—

Judgment.

I do not think that the substitution of notice for service mentioned in the latter part of the 2nd rule of Order IX. is intended to apply to ordinary cases like the present of persons within the jurisdiction. You may effect service, however, by leaving a copy of the writ at the office where the Defendant's business is being carried on, and at the lodgings from whence he had absconded; and you should also cause advertisements to be inserted in the *London Gazette* and in the *Times* newspaper. I shall give no direction as to the time for the appearance of the Defendant, which will be the ordinary eight days, according to the usual form of writ, and under the Rules of Court he can appear at any time before judgment.

Solicitors: *Chapman, Turner, & Prichard.*

V.-C. H.
1876
Feb. 17.

CRANE *v.* JULLION.

[1876 C. 46.]

Practice—Judicature Acts—Service of Writ—Substituted Service—Rules of Court, 1875, *Order* IX., *r.* 2.

Service of the writ in an action to recover possession of leasehold houses against an absconding Defendant, who had given the tenants notice to pay their rents to him, directed to be effected by leaving a copy of the writ at each of the houses, and by advertising in the *London Gazette* and the *Times*.

In such a case the ordinary eight days' time will run from service of the copy of the writ and issue of the advertisements.

Form of Order.

Statement.

THIS was an action to establish title to and to recover the rents and possession of ten leasehold houses, and for an account, injunction, and receiver.

The Plaintiff was the representative of the mortgagor, and also of the mortgagee (who were both dead), of the houses in question; and the Defendant was a person who had been appointed by the mortgagee and had acted as agent to receive the rents, but had recently refused to hand them over, had claimed the houses as his own, and had given notice to the tenants to pay the rents to no one but himself.

The Defendant had recently resided at 14, *Trafalgar Square, Twickenham*, but had suddenly left, taking his furniture with him, and leaving the house unoccupied, and the Plaintiff was unable to discover his address, or to effect personal service.

Argument.

Everitt, for the Plaintiff, now moved for an order for substituted or other service of the writ, under the Rules of Court, 1875, Order IX., rule 2, and for a receiver.

The action was practically an action for ejectment; under the old practice the writ might be served on a tenant of the lands, and that course might be adopted here.

Judgment.

HALL, V.C.:—

You may serve the writ of summons by leaving a copy of it at

each of the houses in question, and you must advertise in the *London Gazette* and the *Times* newspaper. The ordinary eight days' time for appearance will run from the service of the writ and issue of the advertisement, whichever be the later. You may also take an order for a receiver.

The following is a minute of the order made :—

Order for appointment of receiver. Refer it to Chambers to appoint receiver. Order for substituted service by serving copy writ at each house, and advertising in the *London Gazette* and the *Times* that the action has been commenced, and that the Court has authorized service by leaving copy writ with the tenant of each house, and by these advertisements, and that the Defendant is required to appear, otherwise the action will proceed against him as for default of appearance. Costs to be costs in the action.

Solicitors : *Drake & Son.*

CALDWELL *v.* PAGHAM HARBOUR RECLAMATION COMPANY.

[1876 C. 3.]

Practice—Judicature Acts—Amendment of Writ—Action—Information—Pending Motion.

An action may by amendment of the writ and statement of claim be turned into an information and action without prejudice to a pending motion in the action, the necessary sanction of the Attorney-General being obtained.

Statement.

THE writ in this action was served on the 7th of January, together with notice of motion for an injunction to restrain the Defendants from constructing certain works for the reclamation of an arm of the sea in a manner alleged to be at variance with the provisions of their Act. The motion stood over from time to time for further evidence, and in the expectation that some arrangement might be made for the immediate trial of the action. The Defendants required a statement of claim, which was accordingly delivered by the Plaintiffs, who immediately afterwards submitted to the Attorney-General a draft amended writ and

V.-C. H. 1876 CALDWELL v. PAGHAM HARBOUR RECLAMATION COMPANY.

Statement. statement of claim, in which the name of the Attorney-General was added as informant at the relation of the persons who were Plaintiffs in the action. The Attorney-General signified his intention to sanction the writ and statement of claim as thus amended upon the requisite order to amend being obtained by the Plaintiffs. The Defendants delivered their statement of defence on the 16th of February, and the Plaintiffs now moved for leave to amend their writ and statement of claim as proposed without prejudice to the pending notice of motion for injunction.

Argument. *Dickinson*, Q.C., and *Ingle Joyce*, for the Plaintiffs.

Eddis, Q.C., and *Whitehorne*, for the Defendants.

Judgment. HALL, V.C., made an order in the terms of the notice of motion. The costs to be costs in the action.

Solicitors : *Bircham & Co.; Wilkins & Blyth.*

V.-C. H. 1876 *Feb.* 21.

CLUFF *v.* CLUFF.

[1874 C. 246.]

Will—Freemasons' Charities—Gift of Metropolitan Board of Works Consolidated Stock—Mortmain Act.

A gift of Metropolitan Board of Works 3½ Consolidated Stock (1) to charity is void under the *Mortmain Act.*

Statement. *WILLIAM CLUFF*, who died in June, 1874, by his will, dated the 11th of February, 1874, after making numerous bequests, bequeathed three sums of £1000 each, and one sum of £500, to be invested in Consolidated Bank Annuities; and desired that the income might be applied in the purchase of coals for the charitable purposes in the will mentioned. The testator then bequeathed to the trustees of the *Freemasons' Charity Boys' School* the sum of £3500 Metropolitan Board of Works 3½ per Cent. Consolidated Stock, and also to the trustees of the *Freemasons' Charity Girls'*

(1) Created under Metropolitan Board of Works Loan Acts 1869 & 1871 & 1875. (32. 33 Vict. c. 102, 34-35 Vict. c. 47, 38. 39 Vict. c. 65).

School the sum of £3500 like stock, for the benefit of boys and girls educated at those schools, as in the will directed. V.-C. H. 1876 CLUFF v. CLUFF.

The suit was one for the administration of the testator's real and personal estate, which was of large value.

Dickinson, Q.C., and *Vaughan Hawkins*, for the Plaintiffs. Argument.

Hastings, Q.C., and *Laing* and *Langworthy*, for the Defendants; and

Whitworth, for other parties.

No one appeared for the *Freemasons' Charities*.

HALL, V.C., was of opinion that the two bequests of £3500 each to the *Freemasons' Charities* were of impure personalty, and therefore void. Judgment.

Solicitors: *Gellatly, Son, & Warton; Lewis & Whitbourne.*

SHEPHARD *v.* BEANE.

V.-C. H. 1876 Feb. 25.

Practice—Judicature Act, 1873, *s.* 24, *sub-s.* 3—*Rules of Court*, 1875, *Order* XVI., *rr.* 17, 18, 19—*Mortgagor, Mortgagee, and Sub-Mortgagees—Counter-claim—Notice to and Service on co-Defendants.*

Where a question arises as to the rights of mortgagees and sub-mortgagees who are co-Defendants, the proper course to pursue is to raise it by counter-claim, and to deliver it to the co-Defendants.

In the *Judicature Act*, 1873, s. 24, sub-s. 3, and Rules of Court, 1875, Order XVI., rules 17, 18, and 19, "notice" is applicable to third parties, and not to co-Defendants.

THIS was an action by a second mortgagee against the mortgagor, the first mortgagee, and two sub-mortgagees of the first mortgagee for redemption and foreclosure. There was comprised in the security of one of the two sub-mortgagees other property than that comprised in the security of the first mortgagee. The amount due to the first mortgagee would not be sufficient to Statement.

V.-C. H. 1876

SHEPHARD v. BEANE.

Argument.

satisfy the claims of both his sub-mortgagees. A receiver had been appointed.

W. Renshaw, for one of the sub-mortgagees, applied for the direction of the Court as to the mode in which a case should be raised by counter-claim against his co-Defendant, the other sub-mortgagee, both as regarded priority (which was the main question), and of marshalling in reference to the other security held by that sub-mortgagee, and as to whether any and what notice ought to be served on him. The difficulty experienced was as to the construction to be put upon the language of sub-sect. 3 of sect. 24 of the *Judicature Act*, 1873, which, after enacting that "the said Courts respectively, and every Judge thereof, shall have power to grant to any Defendant in respect of any equitable estate, or right, or other matter of equity . . . all such relief against any Plaintiff or Petitioner as such Defendant shall have properly claimed by his pleading," . . . enacted that, "and also all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any rule of Court or any order of the Court as might properly have been granted against such person if he had been made a Defendant to a cause duly instituted by the same Defendant for the like purpose; and every person served with any such notice shall henceforth be deemed a party to such cause or matter with the same rights in respect of his defence against such claim as if he had been duly sued in the ordinary way by such Defendant." The Rules of Court of 1875, which seemed to apply to the 24th section of the Act of 1873, were Order XVI., rules 17, 18, 19, but they appeared to deal with only third parties, and not with co-Defendants. If any one of those rules applied it would probably be the 17th, which provided for the case of a Defendant claiming to be entitled to relief against "any other person," "person" being used *simpliciter* in rules 17 and 19, while rule 18 expressly mentioned only "any person not a party to the action." But if it should be considered that these rules did not apply, then the Court must, he submitted, revert to the 24th

section of the Act of 1873, in the language of which co-Defendants and third persons were clearly mixed up together, and then it seemed, though the language was not clear, that notice need not be given as between co-Defendants.

V.-C. H. 1876 SHEPHARD v. BEANE.

Judgment.

HALL, V.C.:—

I think that the provisions which refer to notice must be considered as being applicable only to third parties.

W. Renshaw :—The next question for consideration is how properly to make the claim, which it is required by the Act shall be properly pleaded, inasmuch as the pleadings so far have only been applicable as between this co-Defendant and the Plaintiff, and it is now proposed on the part of this co-Defendant to raise his defence and make the counter-claim, and also to deliver this proceeding to the co-Defendant.

HALL, V.C.:—

I think that that will be the proper course to pursue.

Solicitor: *W. Easton.*

In re LOUTH AND EAST COAST RAILWAY COMPANY. *Ex parte* RECTOR OF GRIMOLDBY.

V.-C. H. 1876 Feb. 25.

Railway Company — Glebe Lands — Purchase-money in Court — Repairs to Rectory Buildings and Chancel of Church—Queen Anne's Bounty.

The purchase-money of glebe lands taken by a railway company had been paid into Court, and on a petition presented by the rector, the prayer that a portion of it might be allowed for the repairs of the rectory buildings was granted, and that other portions of it might be allowed for the restoration of the chancel, and in paying off the money borrowed from the Governors of Queen *Anne's* Bounty, was not.

Statement.

THE *Louth and East Coast Railway Company* had taken a part of the glebe of the rectory of *Grimoldby, Lincolnshire,* and had paid the purchase-money into Court. A sum had been borrowed by the rector from the Governors of Queen *Anne's* Bounty, to be paid off periodically, spread over a certain term of years. The chancel

V.-C. H. 1876

In re LOUTH AND EAST COAST RAILWAY CO. *Ex parte* RECTOR OF GRIMOLDBY.

of the church required a new roof and other repairs. This was a petition by the rector, praying that a portion of the money which had been paid into Court by the railway company might be applied towards repairing the rectory buildings, another portion in restoring the chancel of the church, and another portion in paying off the money borrowed from the Governors of Queen *Anne's* Bounty.

Argument.

Nalder, for the Petitioner.

Marcy, for the railway company.

Judgment.

HALL, V.C., said he would allow the sum asked for and required for the repair of the rectory buildings, but would not allow any of the money to be expended in the restoration of the chancel of the church, nor allow any of it to be applied in paying off the money borrowed from the Governors of Queen *Anne's* Bounty.

Solicitors: *Collyer-Bristow, Withers, & Russell; R. Dickson.*

Ex parte LYNCH. *In re* LYNCH.

C. J. B.
1876
Feb. 7.

Adjudication of Bankruptcy—Infant—Trade Debt—Infants' Relief Act, 1874 (37 & 38 *Vict. c.* 62).

Notwithstanding the provisions of the *Infants' Relief Act*, 1874, a debtor who has traded while under age can, after he has attained full age, be adjudicated a bankrupt in respect of a trade debt contracted, and upon an act of bankruptcy committed, during his infancy.

Ex parte Kibble (1) distinguished.

Statement.

THIS was an appeal from a decision of the Judge of the *Newcastle-on-Tyne* County Court.

H. P. Lynch traded at *North Shields* as a tobacconist. On the 7th of December, 1875, a bankruptcy petition was presented against him by Messrs. *Nicholaysen & Kirschstein*. The petition alleged that *Lynch* was indebted to the Petitioners in the sum of £83 9*s.* 4*d.* for goods sold and delivered by them to him, for which amount they held two dishonoured acceptances of his to bills drawn by them upon him, one for £52 18*s.* 4*d.*, dated the 21st of May, 1875, and payable three months after date; the other for £30 11*s.*, dated the 2nd of July, 1875, and payable four months after date. The act of bankruptcy alleged was that *Lynch* had, on the 6th of August, 1875, filed a liquidation petition, under which the creditors had failed to come to any resolution.

Lynch opposed the making of an adjudication, on the ground that he was an infant at the time when the petitioning creditors' debt was contracted, he having been born on the 15th of August, 1854.

The Judge was of opinion that, by reason of the concealment of his infancy by *Lynch*, all his trade debts had been contracted fraudulently, and that infancy ought not to be allowed to be a cloak for fraud; and, moreover, that the infant could not be allowed, by filing his liquidation petition, to submit to the jurisdiction of the Court and claim its protection, and then to repudiate

(1) Law Rep. 10 Ch. 373.

C. J. B. 1876 *Ex parte* LYNCH. *In re* LYNCH. Argument.

his own act. His Honour accordingly made an adjudication. *Lynch* appealed.

Finlay Knight, for the Appellant:—

Since the passing of the *Infants' Relief Act*, 1874 (1), an infant cannot contract any valid debt; and, moreover, a debt contracted during infancy cannot be ratified after full age is attained. Consequently there is not a good petitioning creditor's debt: *Ex parte Kibble* (2).

Winslow, Q.C., and *Bagley*, for the petitioning creditor, were not called upon.

Judgment.

BACON, C.J.:—

I thought the law in bankruptcy had been very well settled, that if an infant has been held out and dealt with as a trader he can be made a bankrupt in respect of a trade debt. I do not think that the *Infants' Relief Act* has made any difference with regard to this. This infant has traded, and, in my opinion, that was a clear holding out to the world that he was of full age and capable of contracting debts. The case cited does not apply. There the Court was exercising its undisputed jurisdiction to go behind a judgment and to examine into the consideration for it. The object of the *Infants' Relief Act* was to protect young persons, not from the consequences of trading, but from extravagant debts incurred for unnecessary articles, such as jewelry. It has no application to a case like the

(1) 37 & 38 Vict. c. 62, s. 1: "All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void: Provided always, that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable."

Sect. 2: "No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."

(2) Law Rep. 10 Ch. 373.

present. By filing a liquidation petition the bankrupt adopted a proceeding which an infant could not lawfully take, and he has also clearly held himself out as an adult trader. The petitioning creditor now says, Be that which you have announced yourself to be. In my opinion he has a clear right to an adjudication of bankruptcy.

C. J. B. 1876 *Ex parte* LYNCH. *In re* LYNCH.

18 L.D. 112.

Solicitor for Appellant: *S. R. Hoyle*, agent for *Hoyle, Shipley, & Hoyle, Newcastle-on-Tyne.*

Solicitors for Respondent: *Pyke, Irving, & Pyke*, agents for *J. G. & J. E. Joel, Newcastle-on-Tyne.*

Ex parte THODAY. *In re* ELLIS.

C. J. B. 1876 *Feb.* 21.

Adjudication—Appeal—Locus Standi—Holder of Bill of Sale alleged to be invalid—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 6, 71.

An adjudication of bankruptcy was made, founded upon the execution by the debtor of a bill of sale, which was held to be an act of bankruptcy:—

Held, that the bill of sale holder was entitled to appeal from the adjudication, and on his appeal the adjudication was annulled.

12 L.D. 384 — 906

Affirmed by C. of Appeal 20 W. 797.

Statement.

THIS was an appeal against an adjudication of bankruptcy made on the 30th of November, 1875, by the Registrar of the *Cambridge* County Court, acting as Judge, against *Robert Ellis.*

The adjudication was founded on the execution by *Ellis*, on the 22nd of July, 1875, of a bill of sale of all his personal property to *Francis Thoday*, to secure the payment of a then existing debt and further advances. *Thoday* was present on the hearing of the petition, he having been subpœnaed as a witness to produce the bill of sale, but he was not served in any other character with notice of the proceedings. The Registrar held that the execution of the bill of sale was an act of bankruptcy. On the 15th of December *Thoday* applied to the Registrar for a rehearing of the petition. The rehearing took place on the 10th and 14th of January, and on the 21st of January the Registrar refused to annul the adjudication. *Thoday* then gave notice of appeal from the adjudication,

C. J. B. 1876

Ex parte THODAY. *In re* ELLIS.

describing himself in his notice as a person interested in the question of the adjudication and aggrieved by the order.

Argument.

De Gex, Q.C., and *Cockerell*, for the Appellant:—

Sect. 71 of the *Bankruptcy Act*, 1869, provides that "any person aggrieved by any order of a local Bankruptcy Court" may appeal to the Chief Judge in Bankruptcy. The order of adjudication in this case is founded on the invalidity of the Appellant's security; he is therefore aggrieved by the order, and is entitled to appeal from it.

They then argued on the merits that the execution of the bill of sale was not an act of bankruptcy.

Robertson Griffiths, for the petitioning creditor:—

The Appellant has no *locus standi*. Even if the adjudication remains, it does not follow that the trustee in the bankruptcy will take any steps to set aside the bill of sale; and if he does, the Appellant must be heard before it is set aside. The adjudication will in no way prejudice him.

The result of the evidence is that the bill of sale was an act of bankruptcy.

Judgment.

BACON, C.J.:—

I think that the objection to the Appellant's *locus standi* cannot be sustained. He has a direct interest in the matter, for if the adjudication remains, his security is gone.

His Lordship then decided upon the evidence that the execution of the bill of sale was not an act of bankruptcy, and he annulled the adjudication, giving the Appellant his costs of the appeal.

Solicitors for Appellant: *Tarrant & Mackrell*, agents for *H. J. Whitehead, Cambridge.*

Solicitor for Respondent: *W. Marshall, Ely.*

Ex parte DAVIS. *In re* RUSS.

C. J. B.
1876
Feb. 21.

Liquidation—Registration of Resolutions—Concurrent Bankruptcy and Liquidation Petitions—Adjudication made before Liquidation Resolutions passed—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 125—*Bankruptcy Rules*, 1870, *rr.* 266, 295.

On the 1st of December a bankruptcy petition was presented against a debtor. On the 9th of December he filed a liquidation petition. On the 11th of December an adjudication was made, the debtor not opposing. No stay of proceedings under the adjudication was directed. On the 29th of December the creditors met under the liquidation petition, and resolved on a liquidation by arrangement, and that the adjudication be annulled :—

Held (reversing the decision of the County Court Judge), that the liquidation resolutions must be registered.

Statement.

THIS was an appeal from a decision of the Judge of the *Winchester* County Court.

On the 1st of December, 1875, a bankruptcy petition was presented against *Edwin Russ*, a wine merchant at *Winchester*. On the 9th of December, 1875, *Russ* himself filed a liquidation petition. On the 11th of December the bankruptcy petition was heard in the County Court, and an adjudication was made against *Russ* without any opposition on his part. The first meeting of the creditors was summoned for the 30th of December. No order was made for a stay of proceedings under the adjudication. The first meeting of the creditors under the liquidation petition was held on the 29th of December, when thirty-seven creditors out of one hundred and four were present in person or by proxy. It was resolved by the proper statutory majority that the affairs of *Russ* should be liquidated by arrangement and not in bankruptcy; that *W. H. Davis* should be appointed trustee; that the adjudication should be annulled; and that the necessary steps should forthwith be taken to obtain the sanction of the Court to carry out this resolution. Twelve creditors voted in favour of a bankruptcy. On the 30th of December these resolutions were tendered to the Registrar for registration. He refused to register them, on the grounds—1. That, the bankruptcy petition having been filed on the 1st of December, and the adjudication made on the 11th of De-

C. J. B. 1876 *Ex parte* DAVIS. *In re* RUSS.

cember without any opposition on the part of the debtor, the creditors had no power to hold the meeting and pass the resolutions under the liquidation petition; 2. That any general scheme for the settlement of the bankrupt's affairs, or the receipt of any composition offered by him, and the annulling of the bankruptcy, should be carried out by the trustee in the bankruptcy under sect. 28 of the Act, and not by proceedings for liquidation by arrangement or composition. The Registrar also said that he considered the filing of the liquidation petition prejudicial to the welfare of the general body of creditors, inasmuch as it would result in the estate having to pay two sets of costs.

Statement.

The Judge afterwards affirmed the decision of the Registrar. The trustee appointed by the liquidation resolutions appealed.

Argument.

Morgan Howard, Q.C., and *Reginald Brown*, for the Appellant:—

The resolutions ought to have been registered. The duty of the Registrar with regard to registration is merely ministerial, not judicial; he has only to see that the statutory requirements have been complied with: *Bankruptcy Act*, 1869, s. 125, sub-s. 4; *Bankruptcy Rules*, 1870, rule 295; *Ex parte Levy & Co.* (1). The Court has power to annul the adjudication, now that the liquidation resolutions have been passed: *Ex parte Ashworth* (2). There was no obligation on us to proceed under sect. 28.

The policy of the Act is to leave the creditors to decide in what way the estate shall be administered. Only one creditor has as yet proved in the bankruptcy.

Miller, Q.C., and *G. H. Lea*, for the Registrar, as trustee in the bankruptcy:—

After an adjudication has been made *simpliciter* it can only be got rid of by proceedings under sect. 28: *Ex parte Foster* (3); *Ex parte Walton* (4). The filing of the liquidation petition just before the adjudication affords strong ground for believing that it was filed merely for the purpose of delay: *Ex parte Walton*.

(1) Law Rep. 11 Eq. 619.
(2) Ibid. 18 Eq. 705.
(3) Law Rep. 10 Ch. 59.
(4) Ibid. 215.

Ex parte Ashworth (1) is distinguishable, for there only one creditor preferred bankruptcy to liquidation.

BACON, C.J. :—

It seems to me that the intention of the Legislature was that creditors should have a power over the administration of their debtor's property which, prior to the passing of the present *Bankruptcy Act*, they never had. It seems to me also that the 28th section would provide an easy way out of the present difficulty. It is said that the 4th sub-section of sect. 125, which provides for the registration of resolutions duly passed under a liquidation petition, applies only to a case in which there has been no previous adjudication of bankruptcy. But the right of creditors to hold meetings under a liquidation petition, notwithstanding that bankruptcy proceedings are already going on, is clearly recognised, and the right of a debtor to file his petition for liquidation, although a petition for adjudication has been already presented against him, is the very basis of the decision in *Ex parte Walton* (2). That petitions in bankruptcy and liquidation may be going on at the same time is clearly contemplated by Rule 266, which says that "where proceedings have been instituted for liquidation or composition, the Court may adjudicate the debtor bankrupt if, in the opinion of the Court, the property of the debtor cannot be sufficiently protected by the exercise of the power hereinbefore given to restrain suits and actions, and the appointment of a receiver or manager; but in any such case all proceedings under such order of adjudication shall be stayed immediately upon the making thereof, and until the creditors shall have passed some special or extraordinary resolution in reference to the liquidation or composition; and, in the event of any such resolution being duly passed, the adjudication shall be forthwith annulled." Therefore the right of the creditors to meet under the debtor's petition to resolve on a liquidation and to appoint a trustee, notwithstanding the bankruptcy, cannot be disputed, and that only has been done in the present case. I am called upon to decide whether the Registrar, who was asked to register the resolutions which have been thus passed, was right in saying, I will not

(1) Law Rep. 18 Eq. 705. (2) Law Rep. 10 Ch. 215.

C. J. B. 1876 *Ex parte* DAVIS. *In re* RUSS. Judgment.

register them at all. What the consequences of registration may be I have nothing to do with now. The simple question before me is, whether a debtor, who is by law entitled to present a petition for liquidation, notwithstanding the petition for adjudication, was right in so doing; whether the creditors, having a right to pass resolutions under that petition, are entitled to have them registered; and whether the Registrar was right in saying, I will not register the resolutions because there is already an adjudication of bankruptcy, and because they will put the estate to additional expense. I do not think that the Registrar was at liberty to take any such matters into consideration. He was bound to see that the statutory requisites had been complied with, and, on finding that they were, to make the registration. I do not think he had any power but to register the resolutions for what they were worth. Registration could give no greater validity to the resolutions than they had before; it would only enable the persons interested in them to put them in force. That the Registrar has a discretionary power is true, but he is bound to exercise that discretion with a due regard to the wishes of the creditors. As I have already said, the only question before me is whether these resolutions should be registered or not, and I see no reason why they should not. I have nothing to do now with the consequences of registration; all I have to see is, whether they are lawful resolutions, and I have not heard one word to the contrary. In my opinion the creditors are entitled to have the resolutions registered. Although I should be very loth to interfere with the reasonable exercise of the discretion of the County Court Judge, yet I do not think that that discretion has been properly exercised in this case. The consideration of what may be the effect of the registration does not now arise. I think that the Appellant is entitled to have the resolutions registered *coûte que coûte*. But I make no order as to costs.

Solicitors for Appellant: *Lee & Best.*

Solicitors for Respondent: *Adams, Moberly, & Shenton, Winchester.*

GREAT WESTERN RAILWAY COMPANY *v.* SMITH.

C. A.
1875
V.-C. H.
Nov. 23.
C. A.
1876
Jan. 11, 12.

[1875 G. 64.]

Railway Company—Mines—Lessee—Owner's Compensation—Forfeiture—Surrender—Railways Clauses Act (8 *Vict. c.* 20), *ss.* 6, 78.

A railway company bought land without the minerals thereunder, and constructed a railway upon the land. The landowner made a lease for fifteen years of the minerals. The lessee gave to the company notice of his intention to work the minerals; the company gave him notice, and paid him under the *Railways Clauses Act*, 1845, s. 78, compensation for leaving the minerals. The lessee fell into arrear with his rent, and surrendered the lease to the landowner. A purchaser from the landowner gave to the company notice of his intention to work the minerals, and claimed compensation without regard to the payment already made to the lessee, and began to work the minerals so as to endanger the railway:—

Held, that the company had obtained a right to support from the minerals, and that the landowner would be restrained from working the minerals, but might obtain compensation under sect. 6 or sect. 81 of the *Railways Clauses Act*, 1845, and might have obtained compensation under sect. 68 of the *Lands Clauses Act*, 1845.

Where a lessor re-enters on a forfeiture the rights of under-lessees are gone, but where a lessor accepts a surrender from a lessee the rights of the under-lessees remain although the lessee was at the time liable to forfeiture.

Decree of *Hall*, V.-C., reversed.

Statement.

THE *Great Western Railway* near *Wednesbury* runs for about 300 yards upon an embankment and viaduct, about twenty feet above the level of the soil, and eighty feet above the coal beneath it. This part of the railway originally belonged to the *Birmingham, Wolverhampton, and Dudley Railway Company*, who had, in 1854, bought the land, about four and a half acres, from one *Benjamin Round*, under the Consolidation Acts of 1845. In the conveyance from *Round* to the railway company the mines and minerals under the surface were not included.

The coal under this land had been previously worked out by persons claiming under *Benjamin Round*, leaving only certain ribs or pillars of thick coal, which served to support the railway.

In 1865 the trustees under *Benjamin Round's* will made a lease to one *Hodgkins* of the colliery of which the mines under the railway formed part. The term was fifteen years, at rents of £150

C. A. 1876 GREAT WESTERN RAILWAY CO. v. SMITH. Statement.

and £550 an acre, payable until a total sum of £10,339 had been paid. In 1864 *Hodgkins*, being then in possession of the colliery under a verbal agreement, had given notice under the *Railways Clauses Act*, 1845, to the *Great Western Railway Company* of his intention to work the coal under the railway; and the company then gave him notice that the working would be dangerous, and that they were willing to make compensation (1). After some negotiation the company agreed to pay *Hodgkins* £688 compensation for leaving ungotten all the coal and ironstone under the company's land, *Hodgkins* covenanting to pay the £150 an acre to his lessors, and to facilitate the assessment of the lessors' compensation for leaving the coal permanently ungotten. The company paid the £688, and *Hodgkins* ceased to work the coal. *Hodgkins* died in 1866. In 1869, on an application by his lessors for rent, which was then in arrear, they were informed that his estate was insolvent, and that his executors wished to surrender

(1) 8 Vict. c. 20: "And with respect to mines lying under or near the railway, be it enacted as follows:—

"77. The company shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works, unless the same shall have been expressly purchased, and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands unless they shall have been expressly named therein and conveyed thereby.

"78. If the owner, lessee, or occupier of any mines or minerals lying under the railway, or any of the works connected therewith, or within the prescribed distance, or, where no distance shall be prescribed, forty yards therefrom, be desirous of working the same, such owner, lessee, or occupier shall give to the company notice in writing of his intention so to do thirty days before the commencement of working; and upon the receipt of such notice it shall be lawful for the company to cause such mines to be inspected by any person appointed by them for the purpose; and if it appear to the company that the working of such mines or minerals is likely to damage the works of the railway, and if the company be willing to make compensation for such mines, or any part thereof, to such owner, lessee, or occupier thereof, then he shall not work or get the same; and if the company and such owner, lessee, or occupier do not agree as to the amount of such compensation, the same shall be settled as in other cases of disputed compensation.

"79. If before the expiration of such thirty days the company do not state their willingness to treat with such owner, lessee, or occupier for the payment of such compensation, it shall be lawful for him to work the said mines, or any part thereof, for which the company shall not have agreed to pay compensation," &c.

the lease. After some negotiations, and the filing of a bill to restrain the discontinuing by the executors of the draining of the collieries, an arrangement was made, and the executors of *Hodgkins*, by an indenture, dated the 1st of July, 1869, surrendered on certain terms to the trustees under *Round's* will the colliery comprised in the lease of 1865, except a part which had been underlet. In 1873 the trustees under *Round's* will sold to *Edward Smith* the colliery, including the minerals under the company's land. *Smith*, on the 30th of September, 1873, served on the company notice that he was desirous of working the minerals under the railway. *Smith* and the company were unable to agree as to what, if any, compensation was to be made to him for not working the coal. *Smith* then proceeded to work the coal, and the company found it necessary to build a support to the railway at an expense of upwards of £1000. The Government surveyor reported it doubtful whether these precautions would be adequate to meet the danger; and it was stated that the trains were obliged to slacken their speed at this part of the line.

Statement.

The railway company accordingly filed their bill in this suit to restrain the Defendant from working the coal under their land so as to injure the railway or impede the traffic, and for an account of damages, the company being willing to pay compensation to *Smith*, having regard to the compensation already made to *Hodgkins*.

Smith stated that he had had no notice of the bargain between the company and *Hodgkins*. The company alleged, and *Round's* trustees denied that they had any notice.

The company obtained an interim injunction, and the cause came on before the Vice-Chancellor *Hall* on motion for a decree on the 23rd of November, 1875.

Argument.

Davey, Q.C., and *H. A. Giffard*, for the company, cited *Caledonian Railway Company* v. *Sprot* (1); *Elliot* v. *North Eastern Railway Company* (2); *Holmes* v. *Powell* (3); *Pleasant* v. *Benson* (4); *Midland Railway Company* v. *Checkley* (5).

(1) 2 Macq. 449. (3) 8 D. M. & G. 572.
(2) 10 H. L. C. 333. (4) 14 East, 234.
(5) Law Rep. 4 Eq. 19.

C. A.
1876
GREAT WESTERN RAILWAY CO. v. SMITH.
Judgment, V.-C. H.

Dickinson, Q.C, and *Jolliffe*, for the Defendant.

HALL, V.C.:—

It appears to me that the Plaintiffs' case entirely fails.

The questions which have been discussed are no doubt of very great importance to railway companies with reference to their interest in mines under their railways, and many of the questions are of extreme nicety and difficulty. I have formed opinions upon most of them, but in the view which I take of the case, it will not be necessary for me to express my opinions, and I intend not to do so:—[His Lordship then stated the facts of the case.]

It is clear that when a person who has a right to work mines under a railway gives a notice under the 78th section of the *Railways Clauses Act*, and the company object to the mines being worked, they must give compensation to the person so giving notice in respect of the interest which that person has. It is monstrous to suppose, as has been contended before me, that in the case of a person who has a lease of the minerals for perhaps two years the company are at liberty to deal with that person, and offer him compensation in respect of the entire fee simple in those minerals. That cannot be the meaning of the section. Each person who is about to work is entitled to give notice and to get compensation in respect of his interest.

Now, what was Mr. *Hodgkins*' interest at the time when compensation was made to him? He was lessee for fifteen years, a term which was liable to come to an end by the re-entry of the landlord in respect of the non-payment of any one of the instalments of rent, or in respect of the non-performance of the covenants on the part of Mr. *Hodgkins* the lessee. The railway company perfectly well knew the risk they incurred; and they must be taken to have incurred it. They may have thought that there was nothing or not much in it. They seem, according to their statement, to have compensated him as for the value of the minerals without making any deduction in respect of the possible determination of his lease before the time, and without taking any covenant or any provision which would protect them in respect of their having paid compensation for the whole fifteen years—that is, for the whole of the coal—and the tenant being

turned out the next year. That was their fault. They may have been in a great difficulty as to knowing how to fix the compensation for an interest of that kind. But such is the case. They must deal with it in that way, and they must protect themselves as best they can. If the present legislation on the subject does not enable them effectually to protect themselves, it would be right that they should be protected by further legislation upon the subject; but all I can deal with is the Act of Parliament as it stands at present.

Then, under what circumstances did the interest of Mr. *Hodgkins* come to an end? It is said that a lessee who has created a derivative interest, and made contracts with third parties to the benefit of which those third parties are entitled, is, by the creation of such derivative interest or by such contracts, prevented from making arrangements and dealing with his interest, except subject to those arrangements. As a general proposition of law I do not at all dispute the correctness of that, but the whole of the circumstances of each particular case must be considered, and it cannot be said that in this case it has been shewn upon the evidence that the landlord was compelled to wait until the end of the fifteen years before he could resume possession. To my mind it is clearly established that he was in a position to resume possession under his power of re-entry; and to say that he is to wait, nevertheless, because of this arrangement between the railway company and the tenant is, I think, a proposition which cannot be maintained. We must look at the circumstances of the case. If this was a case of an ordinary character, or could be fairly and properly viewed as a purchase between the landlord and the tenant of the tenant's interest, it might be said that their dealings could not affect the Plaintiffs' right during the continuance of this term. That, however, is not the real truth of the transaction. The landlords were not, as I conceive, bound to go through the process of bringing an ejectment for the purpose of putting in force their power of re-entry. They were at liberty, I consider, to make an arrangement with their tenant that should spare them the necessity of going through that process:—[His Lordship then stated the evidence on the subject.] It was impossible for the executors of *William Hodgkins* to make any stipulation for a confirmation

C. A. 1876 GREAT WESTERN RAILWAY CO. v. SMITH. Judgment, V.-C. H.

of the Plaintiffs' rights to the mines so sold to them, as the executors had no funds whatever, and the lessors were entitled to re-enter for nonpayment, and also to distrain all the stock and plant on the colliery, which stock and plant were liable to be distrained for arrears of royalty, and would not under a distress have realized anything like enough to satisfy such arrears. I consider that this lease must be taken to have come to an end according to its term and provisions, and that the interest which was compensated for therefore being at an end (whether the compensation was too much or not I have nothing to do with), what has been paid has been paid in respect of an interest which has terminated, and correctly and properly terminated.

I have nothing therefore to do in this case, as it appears to me, with the questions which have been argued and discussed before me as to whether or not Mr. *Smith*, the purchaser, had notice of the compensation having been paid as it is alleged to have been paid, and I do not express any opinion whether there was or was not under the circumstances of this case either actual or constructive notice which could affect Mr. *Smith*.

But it is said that if that be so, then this is a case of compensation; and therefore the Court will even now, at the instance of the Plaintiffs, say that the Defendant, the legal owner of these mines, is to be restrained from working these mines because the Plaintiffs are willing to make compensation, and for that purpose the case of *Midland Railway Company* v. *Checkley* (1) has been referred to. The conclusion there come to was, that the company was entitled to work the mines, making compensation. It was not a case arising upon the sections of the Act of Parliament which I have now to deal with. According to those sections Mr. *Smith* as the owner of these mines, was the person who, desiring to work them, had to give notice to the company of his intention to work them. Thereupon the company were entitled, within a certain time, to give notice that they would make compensation, and if they had done so, then compensation must have been received by Mr. *Smith*. But the Act of Parliament declares and enacts that if the company fail to give him notice Mr. *Smith* is to be entitled to work the mines; I cannot, there-

(1) Law Rep. 4 Eq. 19.

fore, take away his statutory right; and that being his statutory right, I cannot say that he shall not now work the mines as the company have not thought proper to offer the compensation within the time which the Act of Parliament allowed them.

C. A. 1876 GREAT WESTERN RAILWAY CO. v. SMITH.

The result, therefore, as it seems to me, upon the short ground on which I have put the case, is that the Plaintiffs' bill entirely fails. I cannot, therefore, do otherwise than dismiss the bill, and of course with costs; and there must be an inquiry as to the damage sustained by the Defendant through the injunction.

Judgment, V.-C. H.

From this decision the company appealed, and the appeal came on for hearing before the Court of Appeal on the 11th of January, 1876.

C. A.

Thesiger, Q.C., and *H. A. Giffard* (*Davey*, Q.C., with them), for the company:—

Argument.

We have already paid for this coal, and now the purchaser wants to be paid for it again. As to the question of notice of the previous purchase, we do not consider it very material; but whether the purchaser had actual notice or not, he must have had constructive notice, seeing that the coal was, and had for many years been, under the railway. The meaning of the 77th and 78th sections of the Act is clear. As the minerals may become very valuable the company is not to be entitled to take them, but whenever the landowner is in a position to work them, the company is to pay for them their full value. It can never have been intended that every time there is a fresh lease or sale of an adjoining colliery the company are to pay for the coal again. When a lease of a mine is for a time sufficient to work out the coal, it is equivalent to a sale of the coal to the lessee, as he will be assumed to intend to work it. He has bought the coal, and can sell it to the company. What has the landowner to complain of? No doubt the sections in the Act are badly worded, but the intention is clear enough. The company pay the lessee for the coal, and he pays to the landowner rent, royalty, or price, or whatever it may be, as if he had got the coal. If the landowner thinks himself injured, he can, under the 68th section of the *Lands Clauses Consolidation Act*, obtain compensation, and the company are quite ready to pay what

C. A. 1876 — GREAT WESTERN RAILWAY CO. v. SMITH. — Argument.

is reasonable: *London and North Western Railway Company* v. *Ackroyd* (1). We dealt with the only person with whom we could deal: *Slipper* v. *Tottenham and Hampstead Junction Railway Company* (2); *Great Western Railway Company* v. *Bennett* (3).

If the landlords had seized as for a forfeiture, they might not be affected by anything which the lessee has done; but this lease was surrendered, and then the company are like a sub-lessee, and are not affected: *Doe* v. *Pyke* (4). Perhaps the landlords might have seized as for a forfeiture, but they did not, and we know nothing about their dealings. At all events, we must be allowed to ransom the railway on reasonable terms.

Dickinson, Q.C., and *Jolliffe*, for the Defendant:—

The Defendant here has bought and is owner in fee simple of this coal, and yet it is said that, by Act of Parliament, his right has been taken away from him, and he is to get no compensation. No one has ventured to suggest that the company is owner of this coal, and how, then, can the company be said to have bought the coal? The company claims support from this coal, but then the owner must be compensated for being prevented from working it. They say they have compensated one tenant, and perhaps he has been compensated for his interest, but that is not ours. Whatever coal the lessee has left clearly belongs, at the end of the term, to the lessor; and why is he not to have it? The Act is rational and consistent, and leaves the company to deal with the owner of the coal. Could the company, within a week of the expiration of the term, pay what the lessee would accept, and then say that the lessor was to have nothing? If the lessee is to pay a royalty on the coal worked, then he will pocket the money paid by the company, and the lessor will get nothing whatever for his coal. Of course, if the Act of Parliament was clear to that effect, we must submit, but avowedly it is not, and is rather the other way. It may be hard on the company, but is the landowner to be left without compensation for what is unquestionably his property? The company may have purchased, but it was from a vendor who had no title, and they must take the usual con-

(1) 31 L. J. (Ch.) 589. (3) Law Rep. 2 H. L. 27.
(2) Law Rep. 4 Eq. 112. (4) 5 M. & S. 146.

sequences. As to the surrender of the lease, that is clearly equivalent to forfeiture. The lessee was in default, and surely it could not be necessary for the landlord to go to the expense and delay of an ejectment when the lessee was ready to give all that could be got by an ejectment.

Judgment, C. A. James, L.J.

JAMES, L.J. :—

This case is, no doubt, in many respects a peculiar case, but, after the elaborate manner in which it has been argued, and after the whole case has been fully placed before the Court, and all the consequences resulting from the different views have been shewn to us, it does not appear to me that there really is any very great difficulty in arriving at a conclusion. I say that with great respect to the Vice-Chancellor, who appears to think there was no great difficulty in arriving at a conclusion different from that which to me and my learned Brothers appears to be the right conclusion.

The *Great Western Railway Company* have filed their bill to restrain a gentleman of the name of *Smith* from working some mines under their railway which are essential to the support of their railway, and without which support the railway in all probability would collapse.

The circumstances under which this case has arisen are these :— [His Lordship then stated the facts.] If Mr. *Smith's* contention is right, if *Round's* trustees had a right to give their tenant a claim for compensation as against the railway company, and then, on the expiration of the lease, had the right again to have compensation, then Mr. *Smith* is in the same position, and could also make his claim. He might also grant a lease for a year to a friend of his, and the lessee for a year could go to the railway company and give a similar notice, and say to them : "Now pay me, or else I will work." The railway company would, if the contention is right, have no alternative but to pay him. At the end of that year Mr. *Smith* might grant another lease to another friend, or indeed to the same friend, and that lessee would then say : "Now you must pay me again." So it might go on *de anno in annum*, giving the person who is the owner of the minerals, under a clause which is said to be introduced for the benefit of the railway company, the power of compelling the railway company to

C. A. 1876 GREAT WESTERN RAILWAY CO. v. SMITH. Judgment, C. A. James, L.J.

pay him the whole value of the excepted minerals every year, or it may be every month (if a month were sufficient to work out the mineral), during which the railway was in existence; that is to say, the owner of the minerals would be entitled to take not only the pound of flesh, but the whole life blood of the railway, if that contention is right.

Now, is that the construction which the Act of Parliament compels the Court to put upon this clause? Fortunately it is not. It seems to me to be such a *reductio ad absurdum*, that it would be impossible for the Legislature to have intended that to be the result of their legislation. What is it that the Legislature has done? The Legislature being of opinion that it was for the public benefit that a railway should be made, and certain persons being of opinion that it would be for their personal benefit to do this beneficial work, they, for their personal benefit, no doubt, obtained from the Legislature the power of making, constructing, and maintaining the railway for ever. For the purpose of enabling them to make, construct, and maintain the railway, they are authorized to buy lands, which is, in fact, the power which they required; but with regard to minerals lying under the land the Legislature said this: "You do not want the minerals, you only want a sufficient substratum or a sufficient support for your railway, and although you are authorized to buy land from anybody, you are not authorized to take the minerals, except only the part required to be taken or used in the actual construction; and minerals shall be deemed to be excepted out of the conveyance."

Of course it struck the Legislature that those mines might still be wanted, not in their character of mines, but for the absolute support of the railway itself, and accordingly the Legislature has said that, notwithstanding they are excepted, they are only to be worked in this way:—[His Lordship then read the 78th section.]

There, no doubt, the Legislature is dealing with a company and a person who is actually on the eve of working the minerals. Now, what was the right of that person? He had got, not a right to occupy, not a right to use, not a right to have a thing like a farm or a house for a certain term of years, but the right to carry and take away the minerals, the actual piece of coal or the actual

piece of iron ore that was found there lying imbedded in the soil; to take that away as a chattel and sell it after he had removed it. But then the Legislature, dealing with him as a man who is really and substantially the owner, said: "No, you shall not take it away if the railway company are minded to pay you for it." In the result, it seems to me that, looked upon as a matter of common sense, the owner was prevented from removing and selling it to anybody else, and was compelled and authorized to sell it *in situ* to the company for the purpose of leaving it there as a permanent support for their railway. He was the person who would have been damaged, and he was the person, therefore, whom the Legislature considered to be entitled to compensation for that which was intended to be a permanent appropriation of this particular mineral for the purpose of a pillar or support to the railway.

Then it is said that if the lessee had not got it, it would have remained, and was the property of the owner; and that we are taking away this property from the owner without making him any compensation. Of course, if property is taken from anybody, or anybody is injuriously affected by the result of any construction put upon an Act of Parliament, that would be a very strong reason why that construction should not be adopted. I understand the broad principle of all these Acts to be, that the railway company is to pay for all property taken or injured, but not to give compensation to persons, except for actual loss or damage. No actual loss or damage is sustained by the reversioner because somebody was prevented from removing that which, if he had removed it, the reversioner would never have got. Therefore there was originally no damage in that sense.

It is possible, however, and not only possible, but probable, that this right to stop the working might have enured to the loss of the reversioner; that is to say, this state of things might well have arisen, and the reversioner might say, "You stopped my tenant from working the mines, and therefore you stopped me from enforcing his covenant to work, which working would have been followed by a payment by him of royalties and other sums of money, and therefore I have been prejudiced to that extent." If so, if damage is ever done to the reversioner by

C. A. 1876

GREAT WESTERN RAILWAY CO. v. SMITH.

Judgment, C. A. James, L.J.

reason of the lessee or occupier being prevented from getting minerals, then that reversioner is, beyond all question, injuriously affected by what has taken place, and being injuriously affected in respect of his interest in the land by reason of the interference with his tenant and with what the tenant would otherwise have done, he would be entitled to compensation under those circumstances, like any other person whose property was injuriously affected by reason of the exercise of the powers contained in the Act.

It appears to me that the 6th section of the *Railways Clauses Act* in terms provides for this very case; that is to say, that anybody who is damaged by the exercise of any power given by the Act of Parliament is entitled to be compensated for any damage so sustained. If my view is right, that the Legislature has authorized a railway company to stop the working in the hands of a worker upon paying that worker for the thing which the worker otherwise would have got, and if by reason of being so stopped the reversioner is damaged, then the reversioner can send in his claim to the railway company, and would be entitled either to have the amount of the claim paid, or to have it ascertained exactly in the same way as any other person whose rights are injuriously affected. It appears to me that that is really the meaning of the 6th section; that is to say, you cannot confine it to one particular owner, because if you confine the stoppage to one particular owner it would not affect the heir, it would not affect the executors, it would not affect he administrators, it would not affect the assignee, or anybody else, who might come in the next day. If it were merely to stop the hands of a particular man who was at that particular moment at work, it must, from the absolute necessity of the case, be a perpetual stopping of the work and a perpetual compensation to anybody entitled to compensation. All the sections which follow the 77th section proceed on the assumption that the working has been stopped, and that the bulk of the minerals has been permanently appropriated to the use of the railway. But the subsequent owners and occupiers have rights given to them of working through the excepted space under certain circumstances, and they have rights given to them of being paid compensation by reason of any extra

expense they are put to through what has been done by the severance of the mine through the operation of the 78th section.

That being so, I am of opinion that the company were right, and that they were not obliged to pay Mr. *Smith* for the mines which, subject to the question of damages I have mentioned, became theirs, that is to say, became subject to their right to support from the moment when the notices were given, or rather from the exchange of notices between Mr. *Hodgkins* and them. That being so, they were right in saying, "You must not work those mines, for those mines have been wrought far enough, and you must allow for a support to the railway." Therefore, they were right in filing their bill for an injunction, and consequently a perpetual injunction ought to have been granted. That will be without prejudice to any question as to any compensation which they might be entitled to by reason of the mines having been stopped. We do not say by whom.

In arriving at that conclusion it is not absolutely necessary to say anything with regard to the effect of the lease and the expiration of the term of fifteen years; but nothing that I have heard makes me entertain the slightest doubt in this case that there never was a forfeiture, or anything equivalent to a forfeiture. The reversioner must enter either by operation of law or by proceeding *in invitum*. He may have the fullest right to enforce a forfeiture; but if, instead of enforcing a forfeiture, he comes to an arrangement with the lessee that for some compensation he shall accept a surrender instead of proceeding to forfeiture, then that is in point of law a surrender and not a forfeiture; and it is quite clear that if the right which the company had obtained from Mr. *Hodgkins* had been obtained during the term of fifteen years, no subsequent arrangement between him and his reversioner could have deprived the railway company of that which they had acquired. The right being in respect of a legal right given by the Act of Parliament to the railway company, the question of valuable consideration without notice is wholly irrelevant to any question between the parties.

I am of opinion, therefore, that the Plaintiffs are entitled to a perpetual injunction, and that the Defendant must pay the costs of the suit, including those of the appeal.

C. A. 1876 GREAT WESTERN RAILWAY CO. v. SMITH. Judgment, C. A. Mellish, L.J.

MELLISH, L.J.:—

I am of the same opinion.

If the 78th section were construed literally, I think it would be difficult not to come to the same conclusion as the Vice-Chancellor did; because, no doubt, what it says is: "If the company be willing to make compensation for such mines, or any part thereof, to such owner, lessee, or occupier thereof, then he shall not work or get the same." The whole difficulty, as it appears to me, arises from those words, because I agree that the words "owner, lessee, or occupier," in that sentence, must mean the owner, if the owner is the man who has given the notice; the lessee, if the lessee is the man who has given the notice; or the occupier, if the occupier is the man who has given the notice. Therefore the clause in terms says, that if the lessee has given a notice, then the lessee "shall not work or get the same," and it does not in terms say that the reversioner after the lease has expired shall not get it. With respect to that difficulty I, in the first place, observe that it applies to the owner just as much as it does to the lessee, because it does not say in terms that the heir or assignee of the owner shall not get it; it only says that he, the owner himself, shall not get the mines. Everybody must admit that if the person who has to get the compensation, and who has received the notice is the owner in fee simple, it must mean not only that he, that is that particular man, shall not get it, but it must mean that the people claiming under him—that is to say, his lessee, his heir, or his devisee—shall not be entitled to get it.

Then the question arises whether the same construction is not to be put in the case of a lessee or occupier. That makes it very necessary to consider what, in the case of a lease, would be the rights of the landlord. If the landlord would not be entitled to any compensation, then of course there would be a strong reason for saying that he could not be prevented from getting the mines when the lease was expired. But if the landlord is entitled to compensation, if he is to receive compensation in respect of his not getting royalties, and the lessee is to receive compensation in respect of his not being allowed to work the mines, then they are both compensated, and then, so far as I can see, there is very little

difference between the case of a lessee and the case of an owner in fee simple.

Then, can the landlord in that case make a claim for compensation? It appears to me that very clearly he can do so; because in an ordinary case (taking any ordinary case of a lease and not alluding to the terms of this particular lease) if a lessee has given the notice, and if from the company having offered to compensate him he is deprived of the power of working the mines, the necessary consequence is that the landlord is deprived of his royalty in respect of the lessee getting the produce of those mines. I think that this fact has in this case been rather overlooked, because, under the circumstances of this particular case, it may be for the advantage of Mr. *Smith* to be entitled to get the mines after the lease is over—and particularly after the lease has been surrendered, the term not yet having expired—it may be for his advantage that he should be entitled to get the mines, rather than that he, or *Round's* devisees, who were the landlords at the time, should be entitled to be compensated in respect of the royalty. Yet, in a great number of cases, the landlord would be most injuriously affected if he were not entitled to get compensation for losing his royalty; even although he were entitled to enter and get the mines after the lease had expired. A variety of cases might be put. In the first place, a landlord might have merely a limited interest. He might be a mere tenant for life, and when the lease expired he might be dead; and, therefore, might never be able to get the mine after the lease had expired; yet he may be deprived of his royalties in the meantime; or the lease might be a lease for fifty years, and the value of the right to get the minerals at the expiration of those fifty years, might be worth nothing; or the quantity of the minerals might be so small that it would never pay to get them at all at the end of the lease, and yet the landlord might be deprived of the royalty. It therefore appears to me perfectly clear that the landlord is a person who, by reason of the tenant being prevented from getting the minerals, is deprived of his royalties.

I entirely agree with what has been said, that it is impossible to read the 6th section of the *Railway Clauses Act* without seeing that it would apply to that case. It is true that on account of the

C. A. 1876

GREAT WESTERN RAILWAY CO. v. SMITH.

Judgment, C. A. Mellish, L.J.

introductory words to the 6th section the House of Lords, in *Hammersmith and City Railway Company* v. *Brand* (1), although with a considerable difference of opinion, held that, because this section is prefaced by the words, "and with respect to the construction of the railway and the works connected therewith," compensation cannot be claimed for damage sustained by reason of the working of the railway. That is to say, if a man is prejudiced by the noise of the trains going past his house, or by the dust getting into his house, or by the sparks from the engine setting fire to his property, those being damages which occur, not by reason of the construction of the railway, but by reason of the working of it, therefore, compensation cannot be granted. But that really is not the case here, because the damage that the landlord has sustained surely is damage by reason of the construction of the railway; and even if it does not come within the words, "lands taken or used," which I rather think it would, at any rate it must come within the words "by reason of the exercise, as regards such lands, of the powers by this or the special Act, or any Act incorporated therewith vested in the company."

By reason of the railway having been constructed, power is vested in the company, when the lessee is about to get the mines and gives them the notice, to give him a notice that they are ready to compensate him; they have then the power to prevent his getting the mines, and by reason of his being prevented from getting the mines the landlord is deprived of his rights. It appears to me that the landlord in that case is a person injuriously affected by the powers of the Act. The consequence is that he is a man entitled to give notice under the 68th section of the *Lands Clauses Act*, and to claim compensation at that time.

It seems to me that the Act having given the railway company power to buy the property at its full value, and making them liable to compensate the man who is entitled to get minerals in respect of his having been deprived of the right of getting the minerals, and also making them liable to compensate the landlord who claims to be compensated in respect of his loss of royalties, it necessarily must follow that they thereby gain the right to have the minerals kept for ever for the purpose of supporting their line. The real

(1) Law Rep. 4 H. L. 171.

difference, I think, between us and the Vice-Chancellor arises from this, as is shewn from the Vice-Chancellor's judgment, that he omitted to consider the distinction between a lease of lands and houses and a lease of minerals. No doubt, as he says, it is most unjust, and it is impossible that the Legislature could have intended, in the case of a person who has merely a limited interest, that because the railway company have compensated a person who has merely a limited interest, that shall affect a right which arises after that limited interest is over. No doubt in the case of a lease of houses and lands that would be so, because a person who is a lessee of houses and lands is only entitled to use the houses and lands, and take the benefit of them during the term of the lease; and upon the expiration of the lease the reversioner is entitled to the interest in the houses and lands. But in the case of minerals, if the lessee has time to take them, however limited his interest may be, when he has once taken and sold them, the person who has to come in after him is just as much deprived of the minerals as if the person who got them had been the owner in fee simple. What does it matter? Supposing the person who is entitled to the minerals to be tenant for life, what difference can it make to the reversioner? If the tenant for life has the time and the power to take the minerals and sell them, and put the proceeds in his pocket, is not the man who comes afterwards just as effectually deprived of the minerals as he would be if instead of being tenant for life the person who took them had been tenant in fee simple?

No doubt there will, in construing the Act, be a difficulty—which I do not think it necessary for us to solve in the present case—where it is doubtful whether a person with a limited interest would have time to get the minerals if he were allowed to get them. Whether, in assessing compensation to a person who has given notice, the jury or arbitrators are to take into consideration the probability, or possibility, that he might not be able to get the minerals, and then compensate the reversioner on the footing that he is entitled to the minerals, I conceive to be a very difficult question. If there was a lessee whose lease is to last for a certain time and no longer, or if there was a tenant for life, an actuary would tell you what the value of their interests would

C. A. 1876 GREAT WESTERN RAILWAY CO. v. SMITH. Judgment, C. A. Mellish, L.J.

be, and then you might calculate what they were as compared with the interest of the remainderman. But you might have the case of an owner who had a limited interest which it was wholly impossible to calculate. For instance, in the case of a widow who was to lose her estate if she married, how would it be possible to calculate whether she would marry or not? She might give her notice to work, and she might receive a notice that the company were willing that compensation should be assessed. It might be alleged on her behalf that she was entitled to the whole of the minerals; and she might be a young widow likely to live for some thirty or forty years. The compensation could only be assessed on the footing that she was entitled to the whole, and yet she might marry the next day, or be at the time engaged to marry. I have very great doubt whether the Act does not mean that the person who is entitled for the time being must be taken, for the purposes of the Act, as if he were the owner, because, be it observed, notice cannot be given till the owner is in a position by law to give it. If the notice were given when the workings were 80 or 100 yards off, the company would be entitled to say, you have no business to give us this notice, because you are not in a position to get the minerals under the railway. Possibly you may never be in a position to get them, and you cannot give the notice until you have actually worked the minerals so far and arrived at such a position as to be able to get them under the railway. However it is not necessary to decide that question, because in this case there can be no doubt that, at the time when the notice was given, the lessee had before him ample time to get the minerals.

Therefore, on that part of the case, I am of opinion that we are not obliged to adopt the construction of the Vice-Chancellor, which would lead to the extraordinary result which has been pointed out by the Lord Justice, viz., that the railway company might be compelled to pay the full value of the mine, not only twice, but any number of times.

We are not obliged to adopt that which seems to me an absurd construction. If the true construction of the Act of Parliament be that railway companies are to have these minerals perpetually retained under the railway for the purpose of being a support to the railway, it follows that that is a legal right; and it is not

necessary to inquire whether Mr. *Smith* was or was not a purchaser for valuable consideration.

The other question, whether there was a forfeiture in this case or a surrender, does not really arise; but I must say that I cannot entertain any doubt that this was a surrender. It is a rule of law that if there is a lessee, and he has created an under-lease, or any other legal interest, if the lease is forfeited, then the under-lessee, or the person who claims under the lessee, loses his estate as well as the lessee himself; but if the lessee surrenders he cannot, by his own voluntary act in surrendering, prejudice the estate of the under-lessee, or the person who claims under him. If the question arose between an under-lessee and the landlord, the moment the surrender was produced, and it appeared in Court that there was a surrender of the estate, I have no doubt that a Common Law Court must necessarily hold that the landlord had waived all right to forfeiture by accepting a surrender. It would not be a case decided upon equitable grounds, but it would be a purely legal question, that is to say, although there might have been a right to claim a forfeiture if the landlord had chosen to insist upon it, yet he, *de facto*, not coming in under a forfeiture but under a surrender, if he then brought an action of ejectment against the under-lessee, the moment the surrender was produced the action must, in my opinion, fail, and the under-lessee would be entitled to keep his estate.

BAGGALLAY, J.A.:—

I am of the same opinion.

It appears to me to have been the intention of the Legislature in framing the 78th section of the *Railways Clauses Consolidation Act* to confer upon a railway company the power of preventing the working or getting minerals under or within a certain distance of a railway in cases in which it should appear to the company that it might be likely to damage the works of the company if those minerals were worked or got. It provides that upon the person in actual occupation, whoever he may be, whether he fills the character of owner or lessee, or is a mere occupier of the mineral property, giving notice of his intention or desire to work these

C. A. 1876

GREAT WESTERN RAILWAY CO. v. SMITH.

Judgment, C. A. Baggallay, J.A.

minerals, the company are to express their willingness to make compensation, and the compensation is then to be assessed. That which is to be assessed is the compensation to "such owner, lessee, or occupier."

Now, no doubt, at first sight it might appear as if the restriction upon the working or getting minerals is limited to the particular person who was in occupation of the mines at the time, and who had expressed his desire to work them. But I think that when reference is made to the following clauses of the Act of Parliament, all of which come under the general head of mines, it is quite clear that the intention was that this restriction was to be permanent, and not limited to the particular occupier at the time. You find there a provision as regards the mineral communication; you find a provision made for any damage which might be sustained by the user of the surface land where the owner is a different person from the owner of the mines below. It all points to the intention that the restriction was to be permanent.

But if, as has been contended in the course of the argument, it had appeared to me that the Act of Parliament contained no provision by which the injury sustained by the person or persons owning the reversionary interest in the mines could be assessed or provided for, I must confess it would have gone a very long way to induce me to think that that restriction was intended to be limited to the particular person who had given the notice. I think, however, that there is an absolute provision in the Act of Parliament for securing compensation. The course adopted in the *Lands Clauses Consolidation Act* and in the *Railways Clauses Consolidation Act* has been to provide for compensation in particular instances, and also to add a sweeping clause in terms which include all cases as regards which there may be a special operation.

The question has not been raised, and I do not desire to express an opinion upon it, but I am by no means certain that compensation in the case of minerals might not be obtained under the 81st section of the *Railways Clauses Act*, which relates to injury done to mines. Supposing it cannot be obtainable under the 81st section, it is clearly expressed in the 6th section. As regards the 6th section, that clause, like other clauses in the *Railways Clauses Act*, is

to be taken subject to the provisions and restrictions contained in the *Lands Clauses Consolidation Act*. Therefore I think that, by the combined operation of the clauses in the one Act and the clauses in the other Act, abundant provision is made for securing full and complete compensation to the reversioner. That compensation might be in respect of the loss of his royalties through the minerals not being worked. It might be compensation in respect of the loss to the reversioner by reason of its being impossible to work the minerals or to get them within the time which the occupying tenant might have to work them. Be that, however, as it may, it is a matter to be determined when a proper application is made for the purpose of having that compensation assessed.

There is no doubt that the peculiar circumstances of this case have introduced elements of difficulty. It is said that that which has been treated as a lease of these mines was substantially a sale, because a term of years is fixed, the length of which is sufficient to enable the whole of these minerals to be obtained from the mine, and the amount of rent was fixed at a sum which appears to be the full estimated value of the minerals. Those are matters which have to be taken into consideration at the proper time, when the question of compensation to the owner of the reversionary interest will have to be decided. At present it appears to me that the decision of the Vice Chancellor cannot be maintained, and there should be a decree for a perpetual injunction, and, as suggested by the Lord Justice, without prejudice to the claim for compensation.

Solicitor for Plaintiffs: *R. R. Nelson.*
Solicitors for Defendant: *Rhodes & Son.*

C. A.
1875
C. J. B.
Dec. 20.
C. A.
Jan. 28.
1876

Ex parte KING. *In re* KING.

Bankruptcy—Bill of Sale—Assignment of all Debtor's Property—Fresh Advance.

A trader who owed his brother £800 applied to him for a further advance, which the brother declined to make without security; and ultimately, by letters of the 30th of June and the 1st of July, it was agreed that the brother should advance £150, and that on his doing so the debtor should give him a bill of sale of his plant, furniture, and book debts, which comprised substantially his whole property. The brother advanced £50 in August, £50 in September, and £50 on the 6th of October. On the last-named day, being the expiration of the time allowed by another large creditor, who was known by the brother to be pressing for payment of his debt, the debtor gave the brother the bill of sale, which was expressed to be to secure £900 then due, £50 then advanced, and any future advances. In the course of October the brother advanced £100 more. In November the above-mentioned creditor took proceedings in bankruptcy, relying on the bill of sale as an act of bankruptcy:—

Held (reversing the decision of the Chief Judge), that the giving the bill of sale was not an act of bankruptcy, as it was given in pursuance of an agreement by which a substantial further advance was obtained; and that the circumstances negatived the conclusion that the giving it was purposely postponed till the debtor's circumstances were desperate.

Ex parte Fisher (1) distinguished.

Statement.

THIS was an appeal by *Charles King* from a decision of the Chief Judge affirming an order of adjudication against him, the question being whether his execution of a mortgage comprising substantially all his property was an act of bankruptcy.

In June, 1872, *Charles King*, who was a brewer and licensed victualler, purchased for £650 a freehold public-house and brew-house, in which he had ever since carried on his business. He borrowed £400, part of the purchase-money, from a Miss *Cook*, to whom on completion he gave a mortgage for £400. About the same time his brother, *John King*, obtained him a loan of £200 from *J. E. Hilleary*, and by a memorandum in writing, dated the 11th of July, 1872, the Appellant gave *Hilleary* a charge for that sum on the equity of redemption of the above property. By the same memorandum *Charles King*, and *John King* as his surety, agreed with *Hilleary* for repayment of the £200 by three instal-

(1) Law Rep. 7 Ch. 636.

ments on the 1st of March, 1873, the 1st of November, 1873, and the 1st of July, 1874; and they also gave promissory notes, payable at those periods, to secure them. *John King* paid these notes as they became due. Before these transactions, the Appellant was indebted to *John King* to the amount of £194 10*s.* 7*d.*, so that after the above payments had been made the total debt was £394 10*s.* 7*d.* *John King* afterwards made his brother several further advances, and by June, 1875, the total debt was increased to £800.

In June, 1875, *Charles King* applied to *John King* for further advances, which the latter declined to make without security.

The following correspondence then took place:—

June 29, 1875. *Charles King* to *John King.*

"I am sorry to be obliged to ask you to lend me more money. My maltster is still worrying me for more, and as I cannot get any debts in, I cannot pay him without your help. If you kindly do the needful, I will give you a second mortgage upon my property."

June 30, 1875. *John King* to *Charles King.*

"In reply to your letter of yesterday, the money-lending business is becoming a serious question, and I cannot go any further unless I have security; and what you offer is not sufficient to cover me for that I have already lent. As you have a mortgage of £400 on your house and premises, a second charge is not sufficient to cover me. If you will agree to give me, in addition to a second charge, a bill of sale over all your plant, furniture, and book debts, I will make you a further advance of £150 from time to time. This will make a total of £950. Let me know if you agree to these terms."

July 1. *Charles King* to *John King.*

"Thanks for your kind offer of yesterday. If you will advance me another £150, as I want it, I will give you the said charge and bill of sale as requested, at any time you may call upon me to do so."

John King made to his brother a further advance of £50 in August, £50 in September, and £50 on the 6th of October, 1875.

C. A. 1876

Ex parte KING. *In re* KING.

Statement.

On the occasion of the last advance, *Charles King* gave *John King* a mortgage, dated the 6th of October, 1875, the execution of which was relied on as an act of bankruptcy.

By this deed, reciting that the mortgagor was indebted to the mortgagee in £900, and having occasion for £50 more, had applied to the mortgagee to advance it, which he had agreed to do upon having the repayment of the same, as well as of the £900, and any further sums which he might advance to the mortgagor, with interest, secured in manner thereinafter appearing, the mortgagor conveyed the above freehold property to the mortgagee in fee, subject to the mortgage for £400, and to the proviso for redemption thereinafter contained. By a second witnessing part, the mortgagor assigned to the mortgagee all the fixtures, fittings, implements, and utensils of trade, household furniture, plate, linen, china, horse, cart, pigs, articles, and effects, in and about the above freehold premises (all which effects were stated to be specified in the first schedule), subject to the same proviso for redemption. By a third witnessing part, the mortgagor assigned to the mortgagee all and every the book and other debts sum and sums of money, securities for money, and personal estate of the mortgagor mentioned in the third schedule, upon trust to call in, collect, and convert the same into money and apply the proceeds in payment of the £950 and interest, or so much thereof as might be due, and to pay the surplus to the mortgagor, his executors, administrators, or assigns. There was a proviso for redemption of all the property thereinbefore granted and assigned if the mortgagor should repay the £950 with interest on the 6th of November then next, and should repay with interest every further advance on the 6th of November or the 6th of April next after its being made. It was declared that any buildings, engines, machinery, implements, or utensils, fixtures, and effects which should be erected, placed, or used on the freehold property during the continuance of the security should be included in the security. A power of sale was given, exerciseable at any time after the 6th of November then next, with a stipulation that it should not be exercised unless default was made for a month after notice to pay off the moneys due on the security, or some interest should remain unpaid for a month after it became due.

C. A.
1876
Ex parte KING.
In re KING.

It was admitted that this deed comprised substantially the whole of the debtor's property.

After the execution of this deed, and in the same month of October, *John King* advanced his brother the further sums of £26 and £75 on the security of the deed.

Statement.

In August, 1875, a Mr. *Lovell*, who had been a maltster until April, 1875, and supplied the Appellant with malt, had written to him that he should require the payment of the amount remaining due to him by the 6th of October, 1875, and threatened proceedings if it was not paid. These facts were well known to the brother. On the 6th of November *Lovell* filed a petition for adjudication against the Appellant, grounded on the above deed, as an act of bankruptcy. At the time when *Lovell* gave up business the amount due to him from the Appellant was about £1000, but by the time of filing the petition this had been reduced to £435 13*s.* 5*d.*

The book debts scheduled in the bill of sale amounted to about £560, and were, with a very trifling exception, all the book debts owing to the debtor. He deposed that he estimated his furniture at £150. Nothing appeared as to the value of the other personal property comprised in the security, but it was treated on both sides as being trifling. He stated in an affidavit, that, beside the debt due to his brother, the debt of £435 13*s.* 5*d.* to *Lovell*, and a debt of about £300 owing to *Page*, *Lovell's* successor in business, he did not, to the best of his belief, owe more than £400.

The County Court Judge at *Bedford* having held the deed to be an act of bankruptcy, the debtor appealed, and the appeal was heard on the 20th of December, 1875, before the Chief Judge.

Argument.

E. Pollock, for the Appellant.

De Gex, Q.C., and *Bonser*, for the trustee.

The following cases were referred to:—*Ex parte Fisher* (1); *Ex parte Fowle* (before *Bacon*, C.J., Dec. 16, 1872; L. C. and L. JJ., January 31, 1873)[a]; *Ex parte Cohen* (2); *Ex parte Mackay* (3);

(1) Law Rep. 7 Ch. 636. (2) Law Rep. 7 Ch. 20.
(3) Law Rep. 8 Ch. 643.

(a) See W.N. (1872) 230, W.N. (1873) 26.

C. A. 1876

Ex parte KING. *In re* KING.

Judgment, C. J. B.

Lacon v. *Liffen* (1); *Ex parte Topham* (2); *Ex parte Stevens* (3); *Mercer* v. *Peterson* (4); *Ex parte Izard* (5).

BACON, C.J.:—

I confess I am unable to distinguish this case in any important facts, still less in any principle, from the decision in *Ex parte Fisher* (6). The bill of sale *per se*, read by itself, without reference to any other facts than the fact that shortly afterwards he became bankrupt, and was in a state of insolvency, and that the bill of sale conveyed either all, or all with no considerable exception, his estate and effects for an antecedent debt, was an act of bankruptcy, because the antecedent debt is there stated to be the sum of £900, and the advance then made to be only £50, and there is no reference made on the face of the instrument itself, either to any antecedent promise or to any other advance made between the time that the promise was said to have been made and the day in October when the deed was executed. The deed being then upon the face of it apparently an act of bankruptcy, the Appellant desires to support it by shewing that there was an antecedent promise. Now, if I were to hold that such a promise as is found in the letters took the case out of the operation of the *Bills of Sale Act*, I should be opening the door to all the abuses which that piece of legislation was intended to prevent, for nothing would be more easy than for a promise of that sort to be made for advances from time to time to be made upon the faith of it, and for the person who is to have the benefit of the bill of sale to wait until the bankruptcy is imminent, and then say, "Now give me that bill of sale which you promised me, conveying all your property to me, in order that your creditors may have none." Whether the promise to give the bill of sale was or was not capable of being registered is not worth being inquired into. If it could not be registered, then it is within the *Bills of Sale Act*. If it could be registered, it has not been registered, and therefore that is enough to say upon that subject.

(1) 4 Giff. 75. (2) Law Rep. 8 Ch. 614. (3) Ibid. 20 Eq. 786. (4) Law Rep. 2 Ex. 304; Ibid. 3 Ex. 104. (5) Law Rep. 9 Ch. 271. (6) Law Rep. 7 Ch. 636.

I am of opinion, therefore, being unable to distinguish this case either in fact or principle from the decision in *Ex parte Fisher* (1), that I must hold the Registrar's decision to be one that must be sustained. I do not go into the facts of the case, although I am aware of them. I have dealt with it without reference to them, though stress might be laid upon the point urged before the Registrar, that, notwithstanding this promise, there was no deed executed until Mr. *Lovell's* pressure of the bankrupt seemed to make it time that the brother should be protected. However, I do not decide upon that at all, nor does that influence my judgment.

C. A. 1876 *Ex parte* KING. *In re* KING. Judgment, C. J. B.

The debtor appealed from this decision, and the appeal came on for hearing before the Court of Appeal on the 28th of January, 1876.

C. A.

Finlay Knight, and *E. Pollock*, for the Appellant:—

Argument.

Here was a distinct promise to give a bill of sale as soon as the advance, which was of a substantial amount, had been made, and it was given accordingly. There was evidently no intentional postponement, such as is alluded to in *Ex parte Fisher*, and the present is wholly out of the authority of that case.

De Gex, Q.C., and *Bonser*, for the trustee:—

If we look at the deed alone, it is bad on the face of it, being an assignment of all the debtor's property to secure a past debt of £900 and a further advance of £50, an amount not sufficient to protect it. Then, if the antecedent facts, which are relied on to support the deed, are looked at, we find an intentional postponement of giving the bill of sale. The creditor does not ask for it till a hostile demand which the debtor could not satisfy is made by another creditor.

[MELLISH, L.J.:—Does not the fact of the Appellant having advanced more than £100 after the bill of sale shew that the intention was to enable the debtor to carry on his trade?]

The deed must be good or bad at the time when it is executed;

(1) Law Rep. 7 Ch. 636.

C. A. 1876

Ex parte KING. *In re* KING.

Argument.

it cannot be set up by subsequent advances which the Appellant had not agreed to make. To support a deed of this kind by relation back would defeat the object of the *Bills of Sale Act: Ex parte Fowle* (before *Bacon*, C.J., Dec. 16, 1872; L. C. and L. JJ., January 31, 1873). In *Lindon* v. *Sharp* (1) further advances were held not to support the bill of sale, there being no contract to make them; and in *Lacon* v. *Liffen* (2) an assignment to secure a past debt and further advances was held an act of bankruptcy.

Finlay Knight, in reply, referred to *Ex parte Izard* (3).

Judgment, C. A. James, L.J.

JAMES, L.J. :—

I agree with Mr. *De Gex* that it is desirable that nice distinctions should not be drawn in these cases, but that the law should be made as certain as possible. On the other hand, decisions ought not to be strained so as to be made to apply to cases which do not properly come within them. This is a class of cases in which it is impossible to lay down a code of rules which will govern all cases so as to dispense with the obligation to examine the facts of each particular case. In each case, looking at all the circumstances, you have to answer these questions—Does the assignment include all the property, or is there a substantial exception? Is it wholly to secure a pre-existing debt? and if there is a further advance, is it a substantial one, or only one intended to give colour to a security which is in reality made only for the purpose of securing a pre-existing debt? These are questions of fact, and the answers to be given depend on the circumstances. Here the brother refused to lend anything more without security. Letters passed between him and the debtor, and I see no reason to believe that they were written merely to give colour to the transaction. By this correspondence the brother undertook to make, and he did make, further advances to the amount of £150, an amount which, under the circumstances, was not inconsiderable. As soon as the whole £150 had been advanced a bill of sale was given in pursuance of

(1) 6 Man. & G. 895. (2) 4 Giff. 75. 9 Jur NS 13

(3) Law Rep. 9 Ch. 271.

(2) WN (1874) 230, WN (1873) 26

C. A.
1876
Ex parte KING.
In re KING.
Judgment, C. A. James, L.J.

the agreement contained in these letters. The debtor's trade was then going on; he was not expecting apparently that any petition in bankruptcy would be presented against him; he certainly was not contemplating filing a petition for liquidation; he was anxious to go on, and did go on for some time, receiving goods in the course of his trade. The advances seem to have been intended by the brother who made them to be used in continuing the business, and they were so used. They were followed by further advances, not inconsiderable in amount, having regard to the value of the property and the amount of debts. I come to the conclusion that the advances were substantial, and were *bonâ fide* made for the purpose of enabling the debtor to carry on his trade. I am, therefore, of opinion that the decision of the Chief Judge ought to be reversed.

MELLISH, L.J.:— Mellish, L.J.

I am of the same opinion. I should be sorry to do anything to make the law on this subject doubtful; but the numerous cases on the subject have settled the law. The only difficulty is in the application of it. An assignment of all a debtor's property for a past debt is an act of bankruptcy. A merely nominal exception of part of the property will not prevent this, but an exception of a substantial part will prevent it. Whether an exception is substantial, must of course depend on the circumstances of the case. If the assignment includes all the property, and is made in consideration of a past debt and of a further advance made at the time, the further advance, if substantial, has the same effect as a substantial exception out of the property. It is laid down in several of the common law cases, that if a bill of sale is subsequently given in pursuance of an agreement entered into at the time of the further advance, it stands on the same footing as if it had been given at the time of the further advance. In *Ex parte Fisher* (1) we qualified this rule by deciding that where the giving of the bill of sale is purposely postponed till the circumstances of the debtor become hopeless, the antecedent agreement will not sup-

(1) Law Rep. 7 Ch. 636.

C. A. 1876

Ex parte KING. *In re* KING.

Judgment, C. A. Mellish, L.J.

port it. Here there was a clear agreement to give a bill of sale when an advance of £150 had been made, which was not to be advanced all at once, but from time to time. Advances to that amount were made, and at the time of the making the last of them the bill of sale was given. A difficulty, no doubt, arises from the circumstance that Mr. *Lovell* was at the time demanding, and exerting some pressure to obtain, payment of a considerable debt; but I think, on the whole, that both the brothers thought that the debtor might get over the difficulty and continue his business. I am strengthened in this view by the facts that the bill of sale was so framed as to be a security for further advances, and that the brother went on making them to a substantial amount. I do not think that we should be justified in saying that in the present case the giving of the bill of sale was purposely postponed till the debtor was in a hopeless state of insolvency, in order to avoid damaging his credit in the meantime. The bill of sale, then, is to be treated as given to secure not only the £800 already due, but a further advance of £150; and, comparing that £150 with the value of the debtor's property and with the amount then due to the brother, it must, I think, be considered a substantial advance.

Baggallay, J.A. BAGGALLAY, J.A. :—

I am of the same opinion. The giving of this bill of sale would, no doubt, have been an act of bankruptcy if it had not been given in pursuance of the agreement of June, 1875; but when we connect it with that agreement, we find that there was a further advance of £150. The question is, as *Cockburn*, C.J., said in *Mercer* v. *Peterson* (1), whether that sum "can be considered an equivalent for the transfer of the bankrupt's property," and I think that in this case as in that it can be so considered. Then it is said that the present case is within *Ex parte Fisher* (2). I think that nothing was further from the intention of the Court there than to throw any doubt on *Mercer* v. *Peterson*, and you must have circumstances like those of *Ex parte Fisher*

(1) Law Rep. 2 Ex. 304; Ibid. 3 Ex. 104, 106 (2) Law Rep. 7 Ch. 636.

before you come to the conclusion that giving the bill of sale was fraudulently postponed. Here I think that the advances were made *bonâ fide* for the purpose of enabling the brother to carry on his business.

MELLOR, J.:—

I confess that I was very much struck by the circumstance that the bill of sale was given on the very day on which the time allowed by *Lovell* expired, and I thought it difficult to explain this coincidence otherwise than by supposing that the bill of sale was given for the purpose of defeating *Lovell's* claim. I think, however, that the postponement of the execution of the bill of sale has been satisfactorily explained, and that we ought not in this case to draw the conclusion which was drawn in *Ex parte Fisher* (1), with the judgments in which case I quite agree. I think that here there was no such intention as in *Ex parte Fisher;* but as the third instalment of the £150 was paid on the 6th of October, it was natural to give the bill of sale then, and in the circumstances of this trade I think that £150 must be considered a substantial further advance. I believe both parties thought that the debtor would be able to continue his business; for the conduct of the brother in making subsequent further advances is inexplicable on any other ground. I therefore agree with the rest of the Court.

Solicitors: *Hillearys; J. E. Fox & Co.*

(1) Law Rep. 7 Ch. 636.

C. A.
1875
V.-C. H.
Dec. 13.
C. A.
1876
Feb. 5.

HOLT *v.* EVERALL.

[1874 H. 197.]

Policy of Insurance—Married Woman—Married Women's Property Act, 1870 (33 & 34 *Vict. c.* 93), *s.* 10—*Bankrupt—Separate Estate—Bankruptcy Act*, 1869, *s.* 91.

A husband who, before the passing of the *Married Women's Property Act*, 1870, had insured his life, and had paid one premium on the insurance, after the passing of the Act gave up the policy and received instead a policy at the same premium for a sum payable to the separate use of his wife if she survived him, and to him if he survived her. He was at the time in embarrassed circumstances, and soon afterwards came under liquidation by arrangement, and then died. His wife had separate income subject to a restraint on anticipation :—

Held, that the insurance must be taken as effected after the passing of the *Married Women's Property Act*, and that whether the subsequent premiums were paid by the husband out of his own money or out of the income of the wife's separate estate, the money payable on the insurance did not go to the trustee under the bankruptcy, but went to the widow by virtue of the *Married Women's Property Act*, which modified the 91st section of the *Bankruptcy Act*, 1869 :

Held, on the evidence, that the premiums were paid out of the wife's separate estate, and that, therefore, the trustee in bankruptcy would not receive out of the insurance money the amount of the premiums.

Decree of *Hall*, V.C., reversed.

Statement.

IN April, 1870, *John Edward Everall*, a trader, who was a local agent for the *City of Glasgow Life Assurance Company*, insured his life in that company by separate policies for £300 and £500, and paid the premiums thereon. The *Married Women's Property Act*, 1870, came into operation on the 9th of August, 1870, and on that day *J. E. Everall* wrote to know if old policies could be renewed for the sole use of wife and children. The secretary of the company answered that policies could not be altered; and after some correspondence, the two existing policies were deposited with the company to be cancelled, and two new policies for the same sums, and at the same rate of premiums, were issued to *J. E. Everall*. The policies were dated the 3rd of April, 1871, and were in the following form :—

"Whereas, *John Edward Everall*, tanner, *Wem*, *Salop*, being

desirous to effect an assurance on his own life for the remainder thereof, for the benefit and advancement of *Elizabeth Ann Everall*, his wife, in the event of her surviving him, for her sole and separate use, independently of her present or any future husband, but in the event of her predeceasing him, for the benefit of the said *John Edward Everall*, his heirs, executors, administrators, or assigns, to the extent of £500 sterling, with the *City of Glasgow Life Assurance Company*, and having subscribed or caused to be subscribed and deposited at the office of the said company a declaration bearing date the 26th day of March, 1871, which is also signed by the directors subscribing as relative hereto, and which is hereby declared to be the basis of this assurance, and having paid to the said company the sum of £12 14*s.* 7*d.* as the premium for such assurance for one year from the 26th day of March, 1871, Be it known by these presents that if the said *John Edward Everall* shall die at any time within the term of one year, as above set forth, the capital, stock, and funds of the said company shall be liable and subject to pay and are hereby charged with the payment to the said *Elizabeth Ann Everall*, if living at the death of the said *John Edward Everall*, her heirs, executors, administrators, or assigns, for her sole and separate use, independently of any husband whomsoever; but if the said *Elizabeth Ann Everall* shall be then dead, then with the payment to the heirs, executors, administrators, or assigns of the said *John Edward Everall*, of the said sum of £500 sterling, on the lapse of three calendar months next after proof shall have been given of the death of the said assured to the satisfaction of the directors of the said company. And it is hereby agreed that the policy may be continued in force until the expiration of the term first above mentioned, provided the said *John Edward Everall* shall pay or cause to be paid to the the said company at their said office the annual premium of £12 14*s.* 7*d.* on or before the 26th day of March in each year."

Each policy had an indorsement that, notwithstanding its date, it should participate in the profits of the company from the 26th of March, 1870.

The premiums on the policies were duly paid or accounted for by *J. E. Everall* until his estate went into liquidation. Whether they were paid out of his own money or out of certain separate

C. A. 1876 HOLT v. EVERALL. Statement.

income to which his wife was entitled under a restraint against anticipation was disputed; but their Lordships held on the evidence (differing from *Hall*, V.C.), that the premiums were paid out of the wife's separate estate. It was admitted that the last premium was paid out of her separate estate.

On the 8th of January, 1873, *J. E. Everall* presented to the Court of Bankruptcy, a petition for liquidation by arrangement. Resolutions were passed accordingly, and the Plaintiff *Holt* was duly appointed trustee under the liquidation.

On the 8th of June, 1873, *J. E. Everall* died. In July, 1874, his widow brought an action on the policies against the company. The money payable was also claimed by *Holt*, the trustee, and the company obtained an interpleader summons against the widow and *Holt;* whereupon *Holt* filed the bill in this suit against the widow and the company, praying a declaration that he, as trustee in the liquidation, was entitled to the two sums payable under the policies.

The cause was heard before the Vice-Chancellor *Hall* on the 13th of December, 1875.

Argument.

W. Pearson, Q.C., and *J. L. Bird*, for the Plaintiff.

Waller, Q.C., and *Bunting*, for Mrs. *Everall*:—

The trustee cannot be entitled to this policy, as Mrs. *Everall* in fact paid the premiums. At all events, the new policy was, to the extent of the wife's beneficial interest, purchased by her money. It is not a case of fraud or voluntary settlement.

Farwell, for the insurance company.

W. Pearson, in reply.

Judgment, V.-C. H.

HALL, V.C.:—

The Plaintiff, as trustee in bankruptcy of the late Mr. *Everall*, claims to be entitled to the sums assured by two policies, dated in April, 1871, upon the life of Mr. *Everall*. The Defendant, Mrs. *Everall*, the widow of Mr. *Everall*, also claims to be entitled to these sums.

According to the terms of the policies of 1871 the two sums, in

the event which happened, of Mrs. *Everall* surviving her husband, belong to her. The Plaintiff's case, in addition to other points upon which it is unnecessary for me to state my view, is, that the two policies of 1871 were substituted for two similar policies which Mr. *Everall* had, in April, 1870, effected with the same company at the same premiums; that although, according to the terms of the policies of 1871, the sums assured, in the event which happened, belong to Mrs. *Everall*, yet she is not entitled thereto, Mr. *Everall* having, as in fact he did, paid the premiums on the policies of 1870; and the policies of 1871 being in substance a settlement by Mr. *Everall* of the sums assured by the policies of 1870 through the medium of an assurance professedly effected under the 10th section of the *Married Women's Property Act*, 1870; and that inasmuch as Mr. *Everall* was a trader, and became bankrupt in January, 1873, which was within two years from the date of the policies of 1871, the provisions for Mrs. *Everall* in the policies of 1871 are void under the 91st section of the *Bankruptcy Act*, 1869, which (with exceptions not material in the present case) makes void as against the trustee in bankruptcy all settlements by a trader who becomes bankrupt within two years after the date of the settlement. That the two policies of 1871 were substituted for those of 1870 is clear upon the evidence. Mr. *Everall* was the local agent of the assurance company, and applications having been made to him by assurers in reference to making use of policies existing at the date of the *Married Women's Property Act*, 1870, coming into operation, he applied to the secretary of the company to ascertain whether old policies could be renewed so as to operate for the sole use of wife and children. The secretary, in answer, wrote, saying that he thought the old policies could not be altered, but that if the question arose he would consult the company's solicitor. Mr. *Everall* subsequently, and, as far as appears, without any further correspondence with the secretary of the company, delivered to the secretary of the company the policies of 1870, for which the secretary gave a receipt, expressing that they were deposited to be cancelled in order that two new settled policies might be issued in lieu thereof. Two new policies were accordingly issued. They do not refer to the old policies; they purport to be based on declarations made a few days before, but as to whether any such declarations were, in fact, made there was not any evidence. The

C. A. 1876 — HOLT v. EVERALL. — Judgment, V.-C. H.

annual premiums payable under the policies of 1871 were the same as those payable under the policies of 1870; the assurance year was computed from the same date in both sets of policies, and by express indorsements on the policies of 1871 privileges were attached to them corresponding to those which attached to the policies of 1870. There were two or more classes of policies, and the policies of 1871 were of the same class as those of 1870. That the two policies of 1871 were substituted for the two policies of 1870 is, I think, clear. And I think that for the purposes of the 91st section of the *Bankruptcy Act*, 1869, the policies of 1871 should be treated and considered as being policies of 1870, so as to be operated upon by that section, unless the contentions on the part of Mrs. *Everall*, which I now proceed to consider, can be sustained. These contentions are, first, that the policies of 1871 should be considered as being policies effected under the 10th section of the *Married Women's Property Act*, 1870, and effectual as settlements under that section. It appears to me that that section does not operate to render valid, as against the 91st section of the *Bankruptcy Act*, 1869, a policy effected under circumstances such as exist in the present case. Inasmuch as Mr. *Everall* could not have settled the old policies, he could not, by resorting to a new mode of making a settlement, although created by Act of Parliament, and although that Act of Parliament contained provision for a bankrupt's estate being recouped moneys paid for premiums by the bankrupt, get rid of the enactment contained in the 91st section of the *Bankruptcy Act*. The *Married Women's Property Act* is not, I consider, operative as to cases falling within the 91st section of the *Bankruptcy Act*, 1869. That section and Act apply to specified cases, which, as I consider, are left untouched by the general law created by the 10th section of the *Married Women's Property Act* (1). The two Acts can well be read together,

(1) 33 & 34 Vict. c. 93, s. 10: "A policy of insurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife or of his wife and children or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use and of his children or any of them according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors, or form part of his estate.

"If it shall be proved that the policy was effected and premiums paid by the husband with intent to defraud his creditors, they shall be entitled to receive out of the sum secured an amount equal to the premiums so paid."

the specific cases provided for by the one not being repealed by the other, certainly neither expressly nor, I think, impliedly or otherwise. Secondly, Mrs. *Everall*, in her answer, alleges that the obtaining the new policies of 1871 was suggested by her, and under an arrangement come to between her and her husband that she should pay the premiums out of her separate estate; that she accordingly so paid the premiums; and she contends that under such circumstances she is entitled to the proceeds of the policies, she being, under such circumstances, herself the settlor of the policies, Mr. *Everall* having, in Mrs. *Everall's* engagement to pay, or her actual payment of the premiums in respect of the new policies, more than an equivalent for his having paid one year's premiums (those on the policies of 1870), in the moneys assured being by the policies of 1871 made payable to him if he survived his wife. Mrs. *Everall* claims the sums assured irrespective of the *Married Women's Property Act*, or at all events under that Act. In her answer she says it was agreed between herself and her husband that the premiums should be paid out of her separate income. It appears to me that there is no foundation for the contention and claim of Mrs. *Everall*. Such an arrangement as Mrs. *Everall* alleges in her answer to have been made was not capable of being made. She had not any separate estate as to which she could contract. She was by her marriage settlement restrained from anticipating the income to which she was thereunder entitled for her life, and she had no other separate estate. The alleged arrangement, therefore, if come to, was in its inception inoperative. Whether, if it had been acted upon by Mrs. *Everall* making the payments, it could or should be treated as effectual, it is not, I think, necessary to consider, because it is not, I think, established either that such an arrangement was come to, or that the payments to be made under it out of Mrs. *Everall's* separate estate were, in fact, so made. [His Lordship then stated and commented on the evidence on this point.] Upon the whole, I consider that the alleged arrangement and payment out of separate income are not, nor is the latter, established. In coming to this conclusion I do not forget that Mrs. *Everall* has not been cross-examined. It follows that the Plaintiff is entitled to the sums in question, but as the premiums payable in 1873 were paid by Mrs. *Everall*, after Mr. *Everall's* bankruptcy, out of her separate

C. A. 1876 HOLT v. EVERALL.

income, she must be repaid such premiums, and considering that the policies were preserved by those payments, I shall not order her to pay any costs. I cannot, however, give her any costs. The Defendants, the company, must be paid their costs out of the fund, and the residue thereof, after the payment to Mrs. *Everall* of the premiums of 1873, must be paid to the Plaintiff.

C. A.

From this decision Mrs. *Everall* appealed, and the appeal came on for hearing before the Court of Appeal on the 5th of February, 1876.

Argument.

Waller, Q.C., and *Bunting*, for the Appellant:—

Mrs. *Everall* had separate estate, and we say that the premiums were paid out of that separate estate. Except, however, as to the repayment of those premiums, that question is of no consequence, as the money secured by the policies goes to her under the second branch of the 10th section of the *Married Women's Property Act*, 1870 (33 & 34 Vict. c. 93). We do not deny that *Everall* was at the time in embarrassed circumstances, but there was no intention to defraud his creditors. On the contrary, if he had outlived his wife they would have taken a benefit by the policy. Moreover, we say that he took her separate estate, and applied it to pay these premiums, which, so far from being a fraud, was for the benefit of the creditors.

W. Pearson, Q.C., and *J. L. Bird*, for the trustee:—

In the first place, these are not new policies effected since the Act came into operation, as they are simply continuations of the old policies at the old premiums. It was, in fact, a settlement of the old policies, and as such is void as against the creditors: *Stokoe* v. *Cowan* (1).

The *Married Women's Property Act* has not repealed the 91st section of the *Bankruptcy Act* of 1869, which clearly applies to such a case. Any attempted settlement by an insolvent is still void. Then we say that at all events the trustee must have the premiums which, except perhaps the last, we say were not paid out of any separate estate.

(1) 29 Beav. 637. 7 Jur. N.S. 901

Farwell, for the insurance company.

C. A.
1876
HOLT
v.
EVEBALL.

JAMES, L.J.:—

Judgment, C. A. James, L.J.

I am of opinion that the order of the Vice-Chancellor in this case ought not to be affirmed. The policies in question, beyond all doubt, are in terms within the *Married Women's Property Act* —that is to say, there were certain policies granted in the year 1871, and expressed to be effected by a married man on his own life, and on the face of them to be for the benefit of his wife. Now the Act says that such policies shall be for the benefit of his wife, and shall not be subject to the control of the husband or of his creditors, or form part of his estate—though there is another provision with regard to premiums which I will refer to later. The policies are, then, *primâ facie* within that section.

It is contended, however, that they are, in fact and substance, affected by the 91st section of the *Bankruptcy Act*, 1869, which says that any settlement of property made by a trader upon his wife and children shall be void if he becomes a bankrupt within two years from the date of the settlement of the property. But these policies were not settled property. It is also contended that the husband had policies of his own effected for his own benefit, and that the transaction of 1871 was a transaction by which the new policies were made in form so as to be under the *Married Women's Property Act*, but that they were in truth a settlement of the then existing property of the bankrupt. And if it could be made out that this was a device to avoid the 91st section, and that there was any actual property which the Court could consider as of value settled at that time, then probably the Court would say, "We cannot allow a device to be resorted to for the purpose of making anything appear to be a settlement which was in truth not a settlement." But it being within the words of the *Married Women's Property Act*, and not being within the words of the 91st section of the *Bankruptcy Act*, we should then have to look at the real substance of the transaction, in order to see whether it was within the meaning of the Act, and was a thing that was rendered void, as being a fraud upon the Legislature.

In that point of view it is important to see whether there was any actual property—anything that could be called property—at

C. A.
1876
HOLT
v.
EVERALL.
Judgment, C. A.
James, L.J.

the time when the husband obtained the policies in question. If the husband at that time had anything of value, and that was given up as part of the consideration of the new policies, there might be this question; but I am satisfied that that which was given up was not of any value whatever; that there was, in fact, nothing taken away from the creditors, and that the transaction, as far as the creditors were concerned, was in substance exactly the same as if the policies of 1871 had been made without any reference whatever to the existing policies of 1870, which he might at any moment have given up or forfeited, or dealt with as he thought fit. There is, therefore, nothing substantial arising from the fact that the policies of 1871 were in exchange for the policies of 1870. Probably it was an act of favour on the part of the office; and for the purpose of getting business they probably thought that it would be worth their while to grant a new policy in 1871 as if granted in 1870, because they were well content to get the policy on any terms; and it was an allowance made by them to the customer, not in any way affecting the rights of the customer.

But it would be a very different thing as regards this transaction if the premiums were paid out of the husband's money. That might affect the main question itself, and certainly the payment of the premiums out of the husband's money becomes important, because, under the *Married Women's Property Act*, if any premiums are paid by the husband with intent to defraud the creditors, those premiums ought to be repaid to the husband's creditors, and one part of the bill is addressed to that particular relief.

It is important, therefore, to consider the evidence which has been given as to the mode in which the new policies were effected.

Now the wife swears that she entered into an arrangement with her husband that the policies should be effected as they were effected, for her benefit, if she should be the survivor, which has been the fact; and then she says that it was arranged between her and her husband that the premiums on the policies should be paid out of her separate income. [His Lordship then stated and commented on the evidence, coming to the conclusion that the account given by the wife was correct.]

C. A. 1876 HOLT v. EVERALL.

Judgment, C. A. James, L.J.

Under those circumstances, it appears to me that the transaction was a perfectly honest transaction between the husband and wife. There is no ground for saying that the premiums were paid by the husband to defraud the creditors, so as to enable them to recover the premiums under that section. That aids very much the conclusion on the main question, namely, whether the policies were so effected as to be void against the creditors, and I am of opinion that the lady is entitled to the full benefit of the policies, and that the bill ought to have been dismissed with costs.

MELLISH, L.J. :—

Mellish, L.J.

I am of the same opinion. The question of law seems to depend mainly upon the extent to which, if at all, the 10th section of the *Married Women's Property Act* altered or modified the 91st section of the *Bankruptcy Act.*

Now, the Vice-Chancellor, from some expressions in his judgment, seems rather to have thought that it has not modified that Act at all, and that the 91st section of the *Bankruptcy Act* remains exactly as it was before the *Married Women's Property Act* was passed.

In order to determine that question, it is necessary to consider what would have been the effect before the Act of a policy effected for the purpose contemplated by the second part of the 10th section of the *Married Women's Property Act.* Supposing that before the Act a married man had effected a policy on his own life, it might be doubtful whether, before the Act, a simple declaration on the face of the policy that it was for the benefit of his wife and for his children, would have been sufficient to make a trust for the wife and children. But anybody could, without any difficulty, have, either by the same instrument or by another instrument, expressed and declared a trust for the benefit of the separate use of the wife, and after the death of the wife for the use of the children. If a married man, being insolvent and being a trader, had effected a policy of that kind, that would, in my opinion, have been a settlement of property within the 91st section.

That section is confined to traders. The 10th section of the

C. A. 1876 HOLT v. EVERALL. Judgment, C. A. Mellish, L.J.

Married Women's Property Act is not confined to traders, but extends to all married persons. It may be a question whether a trader was not intended to be excepted out of that section. I think he was not, and that the section was intended to apply to all, whether traders or not; because the last part of the section provides for what is to be done if it operates as a fraud upon the creditors. That really is the justice of the case. Before this statute, as is shewn by the authorities, there was no difference between an assignment of a policy of insurance which might be worth a considerable sum and an assignment of a policy of insurance which might be worth nothing, because only a single premium had been paid on it. It appears to me, however, that so far as regards the insurance of a man's life for the benefit of his wife and children, the Legislature intended to alter the law, and to say that the creditors could only get what they would fairly be entitled to, namely, that premiums paid in fraud of them should be repaid to them out of the money payable under the policy. Therefore I am of opinion, that this 10th section does apply, and has so far modified the 91st section of the *Bankruptcy Act*, that if a trader effects a policy accordingly it will be valid under the *Married Women's Property Act*, subject to any liability there may be to repay the premiums paid in fraud of his creditors.

That being the position of a policy made under the Act, what difference does it make that there has been a policy effected before and given up? I agree with the Lord Justice that we must consider what is the substance of the transaction. In this case the old policies were really worth nothing; they were policies which an insolvent trader, knowing that he was going to become a bankrupt, would naturally allow to drop, as he could have no interest in keeping up a policy and paying the premiums for the benefit of his creditors; or perhaps not even for their benefit, because if the policy were such as these were, which had only been effected for a single year, it would be no benefit to the creditors and would be worthless in the hands of the trustee. We may, therefore, consider these as new policies effected under the Act.

Then the other question is, whether these premiums were paid

in fraud of the creditors. That depends on whether they were paid out of the wife's money or out of the husband's money. [His Lordship then stated and commented on the evidence as to that question.]

I come, therefore, to the conclusion that Mrs. *Everall's* story is true; and if the story is true, then the first point hardly becomes material, because if the second policies were really obtained by the husband for the benefit of the wife out of the wife's money, it is very difficult to say that, simply because he got them at a slightly lower premium by giving up the old policies, which would have come to an end whether they had been given up or not, that amounted to a settlement of his property.

Judgment, C. A. Mellish, L.J.

For these reasons I concur in the judgment which the Lord Justice *James* has pronounced.

BAGGALLAY, J.A. :—

Baggallay, J.A.

I am of the same opinion. It appears to me that there are two facts established in this case; one that the policies of 1870 had in 1871 no surrender value whatever, and the other that the premiums upon the policies of 1871 were paid by the wife out of her separate estate.

As regards the former of these two points, the Plaintiff was challenged by the Defendant's answer to shew that there was any value in the surrendered policies; but no attempt has been made to shew that these policies had any surrender value, and therefore it must be assumed they had none.

Then as regards the question by whom or out of what property the premiums on the policies of 1871 were paid, we have a clear and distinct statement on oath by the wife that they were paid by her out of her separate income. No doubt Mr. *Pearson* has ingeniously endeavoured to shew that in the evidence there is or may be some inconsistency as regards these statements, but the Defendant has had no opportunity afforded her of explaining these apparent or rather suggested inconsistencies, and under the circumstances we are bound to assume that those statements are true. Then, these two facts being established, it appears to me impossible to say that this was any settlement of property by the husband

C. A. 1876 HOLT v. EVERALL.

within the intent and meaning of the 91st section of the *Bankruptcy Act*, 1869; nor is there any case of intent to defraud the creditors established against him within the 10th section of the *Married Women's Property Act*.

JAMES, L.J. :—

The bill will be dismissed with costs, including the costs of the appeal.

Solicitors for Plaintiff: *J. & F. Needham*, agents for *H. Morris, Shrewsbury.*

Solicitor for Mrs. *Everall: J. W. Hickin*, agent for *E. Bygott, Wem, Salop.*

Solicitors for the Company: *Thompson & Debenham.*

C. A. 1875 C. J. B. *Dec.* 1, 2. C. A. 1876 *Feb.* 3, 18.

Ex parte BANNER. *In re* TAPPENBECK.

Appropriation of Consignments to meet Bills of Exchange—Agent consigning Goods to his Principal—Passing of Property in Goods—Right to Disposal of Proceeds—Invoice Price—Doctrine of Ex parte Waring.

A firm of merchants in *England* employed a firm of merchants in *South America* as their agents to purchase goods and send them to *England*. The foreign firm drew bills on the English firm and sold them in *South America*, and with the proceeds purchased goods which they shipped to *England*, sending the bills of lading directly to the English firm, and at the same time advising them of the drawing of the bills, by means of which they had purchased the goods, and requesting them to carry the invoice price of the goods to their account. The English firm went into liquidation, and the foreign firm also became bankrupt. When the English firm stopped payment a cargo of goods was *in transitu*, and some of the bills drawn for purchasing them had been accepted by the English firm, but not paid, and others had not been accepted. The trustee in the liquidation took possession of the cargo on its arrival. The creditors of the foreign firm claimed to have the goods appropriated to meet the bills drawn in respect of them :—

Held (reversing the decision of *Bacon*, C.J.), that the foreign firm, whether regarded as the agents of the English firm or as vendors, had parted with all property in the goods, and had no power to direct the appropriation of the proceeds; and, therefore, no equity arose on the insolvency of the two firms in

favour of the holders of the bills to have the proceeds applied in payment of the bills under the doctrine of *Ex parte Waring* (1).

Shepherd v. *Harrison* (2) distinguished.

A direction by consignor to consignee to place the invoice price of goods to his credit and the bills drawn against them to his debit does not amount to an appropriation of the goods to protect the bills.

C. A. 1876

Ex parte BANNER. *In re* TAPPENBECK.

Statement.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

Messrs. *J. F. A. Tappenbeck* and *A. L. Christiansen* carried on business at *Liverpool* as merchants under the name of *Tappenbeck & Co.* The same persons also carried on business at *Para*, in *South America*, in partnership with Mr. *W. Schramm*, who was not a member of the *Liverpool* firm, under the name of *Christiansen & Co.*

The firm of *Christiansen & Co.* purchased large quantities of goods, principally indiarubber and cocoa, and consigned them to *Tappenbeck & Co.* at *Liverpool*. *Christiansen & Co.*, in purchasing and consigning these goods, acted merely as agents, charging a commission, and had no interest in the profit or loss resulting from the consignments. The general course of business was this: *Christiansen & Co.* raised funds to pay for the goods by drawing bills on *Tappenbeck & Co.* and selling those bills at *Para*. They informed *Tappenbeck & Co.* by letter of the bills they had so drawn. They then purchased the goods and shipped them for *Liverpool*, and sent the bills of lading and invoices of the goods by post direct to *Tappenbeck & Co.* at *Liverpool*. They at the same time, or shortly afterwards, made out an account, stating on one side the invoice price of the goods with their commission, and on the other side the proceeds of bills, or the parts of the proceeds of bills, out of which they had paid for the goods, and charging interest on both sides of the account down to the day on which the invoice was made out. The letter also generally stated what proceeds of bills, or parts of bills, remained in their hands to be applied in the purchase of further goods. They also directed *Tappenbeck & Co.*, in their letters, to place the invoice price of the goods to their credit, and the bills to their debit, in the general account between them.

(1) 19 Ves. 345. (2) Law Rep. 5 H. L. 116.

C. A.
1876
Ex parte BANNER.
In re TAPPENBECK.
Statement.

It was admitted that this general account related to no other transactions but those which have been described.

Tappenbeck & Co. stopped payment in July, 1873, and presented their petition for liquidation in August, 1873, which was afterwards agreed to by their creditors. The firm of *A. Christiansen & Co.* was also declared bankrupt according to the law in *Para*. At the time when *Tappenbeck & Co.* stopped payment considerable quantities of goods were in transit between *Para* and *Liverpool*. Some of the bills, out of the proceeds of which the goods had been purchased, were presented to and accepted by *Tappenbeck & Co.* before their stoppage, and some were presented after their stoppage and were refused acceptance. None of the bills were paid by *Tappenbeck & Co.*

A particular consignment of ninety-six cases of indiarubber was treated as a representative case, and was dealt with specifically in the orders of the County Court Judge and the Chief Judge.

The statement made in Mr. *Christiansen's* affidavit respecting this consignment, which was uncontradicted, was as follows:—

On the 23rd of June, 1873, *A. Christiansen & Co.* shipped per *Maranheuse* ninety-six cases of indiarubber, which were marked *A. C. & Co.* The invoice amount of these boxes was £4834 8*s.* 10*d.* They arrived at *Liverpool* on the 10th of August, 1873.

The following is an extract from a letter written by *A. Christiansen & Co.* to *A. Tappenbeck & Co.*, dated the 6th of July, 1873:—

"Inclosed we hand you to-day bill of lading and duplicate invoice of *A. C. & Co.*, 90 cases rubber, shipped for your account per *Maranheuse*, amounting to R.37,399, due 23 June, for which please give us credit on general account."

The following is an extract from a letter from *A. Christiansen & Co.* to *A. Tappenbeck & Co.* dated the 17th of July, 1873:—

"Inclosed you find statement of these shipments, meaning the 96 cases per *Maranheuse* and the rubber per *Helios*, and apportionment of drafts against same, which please examine, and if found correct, enter in conformity. Of our drafts under 5th July, No. 235, £1000, there remain now open £455 15*s.*; and besides, our drafts of 8th July, No. 236, as well as our drafts advised

to-day of £4755 4*s.* 4*d.*, which please protect to debit of general account with us.

"There remain open our drafts of to-day as per statement, No. 238/257, £4755 4*s.* 4*d.*, which please protect to credit of general account."

Statement.

The inclosed document was an account containing on one side the invoice price of the ninety-six cases of rubber with amount of commission, and on the other a list of the bills, the produce of which they had applied wholly or in part in purchasing the goods.

The cargo of rubber was not stopped *in transitu*, and on its arrival it was taken possession of by *Tappenbeck & Co.'s* trustee.

Messrs. *Bickman, Bastor, & Co.*, and other persons, creditors of *Christiansen & Co.* at *Para*, claimed a right to have the proceeds of the indiarubber appropriated to meet the bills which had been drawn upon *Tappenbeck & Co.* with reference to their consignment, both those which had been accepted by *Tappenbeck & Co.* but not paid by them, and those which had not been accepted by them by reason of their insolvency. The County Court Judge of *Lancaster* allowed their claim, and the trustee of the estate of *Tappenbeck & Co.* appealed from his decision to the Chief Judge.

The case was heard before the Chief Judge on the 1st and 2nd of December, 1875.

Argument.

Walton (Herschell, Q.C., with him), for the Appellant.

Robinson, Q.C., and *Aspland (Benjamin*, Q.C., with them), cited *Ex parte Gomez* (1), *Trimingham* v. *Maud* (2), and *Shepherd* v. *Harrison* (3).

Walton, in reply.

Judgment, C. J. B.

BACON, C.J.:—

This case does not differ in substance from a great many other cases in which the same question has arisen, and it would perhaps have been better not to withdraw attention from the real substance of the case by relying too much on those words "specific appro-

(1) Law Rep. 10 Ch. 639. (2) Law Rep. 7 Eq. 201.
(3) Law. Rep. 5 H. L. 116.

C. A. 1876

Ex parte BANNER. *In re* TAPPENBECK.

Judgment, C. J. B.

priation," but to put the true, strict, and literal interpretation on those words. What has to be considered upon this occasion, and upon all occasions of administration in bankruptcy, is, what are the rights of the parties, what are the equities between the parties, because that is the foundation of that case so often quoted, and, I am sorry to say, so much misunderstood—*Ex parte Waring* (1). The principle of that case is the plainest and the simplest that can be conceived or expressed. Bankruptcy having happened in the case of two firms, it became necessary to settle the equities subsisting between them. That is the principle. The ground of the principle is, that the things in dispute, whether they are short bills, as in *Ex parte Waring*, or cases of indiarubber, as in this case, do not belong to either of the parties litigant. The parties holding them cannot, until they have paid over to the parties who shipped the goods, say, "These are mine," for there has been a liability created which must first be satisfied. In that state of circumstances what the law does by the decision in *Ex parte Waring* is to consider that there is a right paramount to either of the litigant parties, a right which must be first satisfied by the realization of the thing which is in dispute, and when that is done the respective rights of the parties can be easily ascertained. Applying that principle to this case, what are the facts? A firm in *Liverpool* commissions a firm in *Para* to buy indiarubber and other produce for them. The firm in *Para* undertake that commission, and not having any money of their own, or any money that they choose to employ, they provide the funds for making the necessary purchase by drafts on the *Liverpool* house, which drafts —the house, I suppose, being in good credit—they discount in the money market at *Para*. In this way they pay for these goods, and they are shipped to *England* and received by the *Liverpool* house, who also receive advice of the acceptances which have been drawn, and do accept, and in many instances pay, the bills when they arrive at maturity. The course of dealing is therefore perfectly plain. It was not necessary that the terms of dealing should be formally expressed in writing. If from the course of dealing and the uncontradicted facts of the case it appears that the goods were bought in *Para* on the credit of the *Liverpool* house, and

(1) 19 Ves. 345.

that the house at *Para* joined, as I may say, as sureties for the payment of that price, and for no other purpose, the plain and common principle of equity is that neither of those parties can claim any positive right to the goods, but that there is another right to be provided for, namely, the right of the unpaid holders of the bills with which the goods were purchased. Now, applying that principle to this case, it seems to me to be wholly beyond doubt. Mr. *Walton* said there was a conflict between the statements of Mr. *Tappenbeck* and Mr. *Christiansen*. I read no such conflict. [His Lordship read passages from the affidavits, and continued:—] As I find, therefore, that the course of dealing is perfectly consistent with that which is called appropriation—whether specific appropriation or not—it is to me quite clear that the manner in which the shipments were dealt with, and the acceptances drawn, proves beyond question an agreement between these parties that the proceeds of the goods shipped should be held by the consignees to answer and protect the drafts on which the *Para* firm had been liable.

That state of things existed down to the time of the liquidation at *Liverpool*. After that, certain goods having been shipped at *Para*, arrived at *Liverpool*. They came into the possession of the trustee in the liquidation. They can only come into his possession subject to all the equities which subsisted before the liquidation commenced, and in my opinion the judgment of the learned Judge, who has declared that, as to the particular bills in dispute, the ninety-six cases of rubber, or such part of them as arrived after the liquidation, formed no part of *Tappenbeck & Co.*'s estate to be administered by their trustee, but must be given up by him to be applied according to the rights which subsisted between the parties at the time when the liquidation commenced, is correct.

That being the principle of the order, if it is suggested that there should be any alteration in the phraseology, I will hear anything that counsel may wish to say on that subject. Then I go one step further. I have said that the principle of *Ex parte Waring* (1) must apply in this case. I understand that there are holders of bills which had been accepted and were not paid by *Tappenbeck & Co.*; but there are holders of other bills which had

(1) 19 Ves. 345.

C. A. 1876

Ex parte BANNER. *In re* TAPPENBECK.

Judgment, C. J. B.

been drawn and were not accepted. Those two sets of holders seem to me to form one class which, consistently with the decision in *Ex parte Waring* (1), ought to be paid out of the proceeds of these goods. That is consistent with the decision in *Ex parte Dewhurst* (2), so far as it has any application to the case. Those holders are not here; nevertheless the rights of the creditors in both the bankruptcies must be equally protected, because the estate of *Tappenbeck & Co.* must not be exposed to proof on their unsatisfied bills, at the same time that the funds with which they were to be met are taken from them by the effect of this order. It must be ascertained what goods remained at the time of the liquidation in specie unconverted, and what goods have come since the liquidation to the hands of the trustee. From these two sources must be satisfied, in the first place, the holders of the bills which at the present time have a right to recover against both the bankrupt estates. By such realization and application, both bankrupt estates will be relieved as far as is equitable from the burden of these bills of exchange, then the rest will be the ordinary administration in bankruptcy. They will have a right to prove, but they will not have a right to prove for more than, after regulating the rights between the parties, is really just.

[After some discussion as to the form of the order, his Lordship added:—]

The right of the *Para* firm extends to all the bills unpaid, accepted and unaccepted; the holders of the unaccepted bills could not of course prove against *Tappenbeck & Co.'s* estate for bills which they had not accepted; but as they have a right to come against *Christiansen's* estate, through the equity that *Christiansen's* estate is to be indemnified out of the goods, the holders get the same advantage that they would have had *quâ* this division of proceeds, as if the bills had been accepted; but they cannot, after they have got all they can out of this equity, prove against the drawers for the full amount.

The order as drawn up declared that such portion of the said rubber (or the proceeds thereof if sold) as was appropriated to bills which had been accepted but not paid by *Tappenbeck & Co.* before

(1) 19 Ves. 345. (2) Law Rep. 8 Ch. 965.

C. A.
1876
Ex parte BANNER.
In re TAPPENBECK

the commencement of the liquidation, ought to be applied by the trustee to the payment of such bills so as to relieve the estates both of *Tappenbeck & Co.* and of *Christiansen & Co.* from liability in respect of such bills to the extent of such proceeds; and that such portion of the said rubber as was appropriated to bills which were not accepted or paid by *Tappenbeck & Co.* ought to be given up to the Respondents; and that the matter be remitted to the Court at *Liverpool*, &c.

C. A.

From this decision the trustee of the estate of *Tappenbeck & Co.* appealed, and the appeal was heard before the Court of Appeal on the 3rd and 18th of February, 1876.

Argument.

Herschell, Q.C., and *Walton*, for the Appellant:—

The Chief Judge decided this case as coming within the principle of *Ex parte Waring* (1); but that case has no bearing upon the present, for here there was no appropriation of the consignments to meet the bills. There could be no such appropriation, for the goods belonged to *Tappenbeck & Co.* *Christiansen & Co.* were not the vendors of the goods, but merely the agents of *Tappenbeck & Co.* They purchased the goods for them, and shipped them to them, sending the bills of lading direct to them. As soon as the goods arrived the property vested in *Tappenbeck & Co.* absolutely, and the consignees had no lien on them, and no power to direct their appropriation. Therefore *Ex parte Dewhurst* (2), on which the Respondents relied in the Court below, has no application. It is quite a novel thing for an agent to claim a lien on goods in the hands of his principal. Even if *Christiansen & Co.* are to be regarded as vendors instead of agents, they would have had only a right of stoppage *in transitu*, and when the *transitus* was complete, all their lien would have ceased: *Feise* v. *Wray* (3). There is no evidence in this case of any special bargain between the parties; there is nothing to give the *Para* firm, or the holders of the bills, any equitable right to the goods. There is no relation between the parties except that of debtor and creditor.

(1) 19 Ves. 345. (2) Law Rep. 8 Ch. 965.
(3) 3 East, 93.

C. A. 1876

Ex parte BANNER. *In re* TAPPENBECK.

Argument.

Benjamin, Q.C., *Robinson*, Q.C. (*Aspland* with them), for the Respondents :—

The course of dealing is evidence of a special bargain between the parties. The bills were drawn upon *Tappenbeck & Co.* against the consignments in each case, and they could not accept the goods and repudiate the bills: *Shepherd* v. *Harrison* (1); *Ex parte Dewhurst* (2). It is true that the bills of lading were made out to *Tappenbeck & Co.*, but it is well established that when bills of exchange are drawn against bills of lading, even though they are not attached to them, the consignee cannot take the bills of lading without accepting the bills of exchange. The bills of lading were only sent conditionally, and the vesting of the property was subject to a defeasance if the consignees did not accept the bills of exchange. Therefore we claim the same equity as to the bills which were not accepted, and as to those which were. If the two firms had been solvent, the agents would have had a remedy in equity against their principals if they had attempted to keep the goods without meeting the bills, and the same equity ought to be worked out in bankruptcy: *Tooke* v. *Hollingworth* (3); *Ireland* v. *Livingstone* (4).

Herschell, in reply.

Judgment, C. A.

Feb. 18. MELLISH, L.J., delivered the judgment of the Court.

After stating the facts of the case, as stated above, his Lordship continued :—

The question to be determined is whether *Christiansen & Co.* had any right, as between them and *Tappenbeck & Co.*, to have the goods specifically appropriated to take up the particular bills the proceeds of which are set off against the invoice price of each parcel of goods in the accounts sent by *Christiansen & Co.* to *Tappenbeck & Co.* If they had, we think that the Chief Judge has properly held that each lot of goods ought first to be applied in taking up the bills accepted but not paid, to take up which it

(1) Law Rep. 5 H. L. 116.
(2) Ibid. 8 Ch. 965.
(3) 5 T. R. 215.
(4) Law Rep. 5 H. L. 395.

was specifically appropriated according to the rule laid down in *Ex parte Waring* (1), and that the goods specifically appropriated to take up bills not accepted should be given up to the Respondents. Now in considering this question, whether there was a specific appropriation of each lot of goods to take up particular bills, it is necessary to bear in mind that this is not a case of a principal consigning goods to his agent for sale on account of the principal, but of the agent consigning goods to his principal, and there appears to us to be a very material distinction between the two cases which has not been sufficiently considered in the Courts below. When a principal consigns goods to his agent for sale, the goods in the hands of the agent remain the property of the principal, subject to any charge which the agent may have on them; and if the principal draws bills upon the agent specifically against the goods, that gives the agent a right to apply the proceeds of the goods when sold in payment of the bills, but subject to that charge the goods and the proceeds of the goods remain the property of the principal. Where, however, an agent in one country purchases goods on account of his principal, and consigns them to him in another country, if the agent allows the property in the goods and the possession of the goods to pass to his principal, the goods become the absolute property of the principal, and the agent, in the absence of an express agreement to the contrary, has no lien or charge upon them in the hands of his principal. Nor does it, in our opinion, in the absence of fraud, make any difference that the agent draws a bill upon his principal for the express purpose of obtaining payment of the price of the goods, and that the principal refuses to accept the bill unless the agent has taken the precaution of making the goods by the bill of lading deliverable to his own order, and has transmitted the bill of lading to an agent of his own, with directions not to hand it over to the principal unless the bill of exchange is accepted. We think that the right of an agent in such a case over the goods, as against his principal, is the same as that of a vendor as against a purchaser. If the agent gives credit to the principal and transfers the property in the goods and the right to obtain possession of the goods by means of the bill of lading to his principal, and fails to stop the

(1) 19 Ves. 345.

C. A. 1876

Ex parte BANNER. *In re* TAPPENBECK.

Judgment, C. A.

goods *in transitu*, the trustee of the principal, in the event of his bankruptcy, is entitled to the goods.

There are three questions in this case which it is desirable to consider: First, had the property in the goods passed to *Tappenbeck & Co.* before they stopped payment? Secondly, did the property in the goods, or any right over the goods, revest in *Christiansen & Co.* on *Tappenbeck & Co.* refusing to accept some of the bills? And thirdly, is there any sufficient evidence of a valid binding agreement by virtue of which *Christiansen & Co.* had a valid charge upon the goods in the hands of *Tappenbeck & Co.*, and a right to have them applied in taking up the bills?

Now with respect to the first question, we think that as soon as the goods were put on board ship at *Para*, and the bills of lading making the goods deliverable to *Tappenbeck & Co.* were put into the post directed to *Tappenbeck & Co.*, and were thus placed beyond the control of *Christiansen & Co.*, the property in the goods passed to *Tappenbeck & Co.* We conceive it is perfectly settled that if a consignor in such a case wishes to prevent the property in the goods and the right to deal with the goods whilst at sea from passing to the consignee, he must, by the bill of lading, make the goods deliverable to his own order, and forward the bill of lading to an agent of his own. If he does not do that, he still retains the right of stopping the goods *in transitu*, but subject to that right the property in the goods and the right to the possession of the goods is in the consignee.

Mr. *Benjamin*, however, strongly contended that, assuming that the property in the goods had passed to *Tappenbeck & Co.*, still that it had passed only conditionally upon the bills of exchange drawn against the goods being accepted by *Tappenbeck & Co.*, and that as soon as *Tappenbeck & Co.* refused to accept any of the bills of exchange drawn against the goods the property in the goods revested in *Christiansen & Co.*, and he relied on the case of *Shepherd* v. *Harrison* (1) as an authority in point. The case, however, of *Shepherd* v. *Harrison* is a direct illustration of the distinction we have been pointing out. In that case the consignor did take the precaution of making the goods deliverable to his own order, and of forwarding the indorsed bill of lading, together with

(1) Law Rep. 5 H. L. 116.

the bill of exchange, to an agent of his own. The agent forwarded the bill of lading and the bill of exchange in the same letter to the consignee, and requested him to accept the bill of exchange and return it. Under these circumstances it was held by the House of Lords that the consignee had no right to keep the bill of lading without accepting the bill of exchange. This case is no authority for holding that if the property in the goods had already passed, the property would revest on the bills of exchange being refused acceptance. We think that the refusal to accept the bills of exchange only gave *Christiansen & Co.* the right to stop the goods *in transitu*, and that this right not having been exercised the property in the goods remained in *Tappenbeck & Co.*, and passed to their trustee on his appointment.

Lastly, we have to consider whether there is sufficient evidence of *Christiansen & Co.* having a valid charge upon the goods after they had come into the possession of *Tappenbeck & Co.*, and having a right to have the proceeds of the goods applied to the payment of the bills. It was contended for the Respondent that every person who consigns goods to another has a right to give directions how the goods are to be disposed of, and that a consignee to whom such directions are given must dispose of the goods in the way directed or else return them. We admit that this is true as a general rule, and that the case of *Tooke* v. *Hollingworth* (1), cited by Mr. *Benjamin*, is an instance of the application of it. The question, however, is, did *Christiansen & Co.* give any directions to *Tappenbeck & Co.* that they were to sell the goods and were to apply the proceeds in payment of the bills of exchange? We think that the argument that they did depends entirely upon a confusion between a direction to deal with the proceeds of goods, that is to say, the sum to be realized by the sale of the goods by the consignee, in a particular way, and a direction to deal with the invoice price of the goods, that is to say, the price at which the goods are sold by the consignor to the consignee in a particular way. Where the consignor directs the consignee to apply the proceeds of the goods in a particular way the consignor still remains the owner of the goods, and if he directs the proceeds to be carried to his credit in a particular account, and the bills to be placed to his debit in the same account, that may amount to a direction to apply the

(1) 5 T. R. 215.

C. A. 1876 *Ex parte* BANNER. *In re* TAPPENBECK. Judgment, C. A.

proceeds of the bills in taking up the bills of exchange. Where, however, a consignor sells goods to a consignee and directs him to carry the invoice price of the goods, that is, the debt due from the consignee to the consignor for the price of the goods, to a particular account, that does not involve a direction to deal with the goods themselves or the proceeds of the goods in any particular way. On the contrary, it admits that the goods themselves are the property of the consignee, and if the invoice price of the goods is placed on one side of an account to the credit of the consignor, and the bills of exchange drawn in respect of the price of the goods are placed on the other side of the account, the only effect is that when the bills of exchange are paid by the consignee, the debt due to the consignor for the price of the goods is discharged, but no charge on the goods in favour of the consignor is thereby created. Now if the letters and accounts in this case sent by *Christiansen & Co.* to *Tappenbeck & Co.* are examined, it will be manifest that the directions contained in them to place different sums to the credit of *Christiansen & Co.* and the sums placed to the credit of *Christiansen & Co.* in the different specific accounts, all relate to the invoice prices of the goods and not to the proceeds of the goods when sold. When *Christiansen & Co.* made up the accounts they did not know what the proceeds of the goods when sold by *Tappenbeck & Co.* would amount to. They knew what the invoice prices of the goods, the sums they had themselves given for the goods, amounted to, and they directed those sums, as they had a perfect right to do, to be carried to their credit in the general account. We cannot, however, find the slightest evidence of *Christiansen & Co.* having given any directions to *Tappenbeck & Co.* respecting the proceeds of the goods, nor is there any evidence of *Tappenbeck & Co.* having sent any account to *Christiansen & Co.* of the way they had disposed of any goods, or of the proceeds of any goods. The whole of the evidence seems to us consistent with the supposition that the parties were dealing on the ordinary terms of agents buying goods for and consigning them to their principals, and having such confidence in their principals that they were willing to sell them goods on credit. The accounts seem to us nothing more than the accounts an agent may be expected to send to his principal to shew how he has expended the money raised by drawing bills on his

principal in the purchase of goods for his principal. On the whole, we are of opinion that the property in all the goods which were in transit at the time *Tappenbeck & Co.* presented their petition for liquidation passed to their trustee, and that *Christiansen & Co.* had no right to have any of those goods applied in taking up the bills of exchange. The consequence is, that the judgments both of the County Court Judge and the Chief Judge must be reversed, and the original application of the Respondents to the County Court Judge to have the goods, or the proceeds of the goods, delivered up to them, must be dismissed with costs; and we think that the trustee of *Tappenbeck & Co.* must also have his costs of the appeal before us.

C. A. 1876 *Ex parte* BANNER. *In re* TAPPENBECK. Judgment, C. A.

Solicitors for Appellants: *Gregory, Rowcliffes, & Co.*, agents for *Hull, Stone, & Fletcher, Liverpool.*

Solicitors for Respondents: *E. W. Owles*, agent for *G. R. Rogerson, Liverpool.*

EDWARDS *v.* EDWARDS.

[1875 E. 77.]

C. A. 1876 *March* 11.

Bill of Sale—17 & 18 *Vict. c.* 36, *s.* 1—*Notice of unregistered Bill of Sale*—*Appointment of Receiver nominatim.*

An order was made at the suit of an equitable mortgagee "that *C. E. M.*, upon his giving security, be appointed receiver" of certain chattels comprised in the security. After this order, but before security had been given, an execution creditor of the mortgagor took the chattels in execution:—

Held (reversing the decision of *Malins*, V.C.), that the receiver was not constituted receiver till he had given security, and that the taking the chattels in execution was not a contempt of Court.

A deed by which a debtor covenants that if the debt is not paid on a day named certain chattels shall be charged with it, and that he will, when required, assign them to the creditor as security, requires registration as a bill of sale.

The fact that an execution creditor was, at the time when his debt was contracted, aware that his debtor had given a bill of sale of chattels, does not prevent his availing himself of the objection that it has not been registered.

Post 303 5 Ch D 40 10 Ch D 320 13 Ch D 25 255 22 Ch D 607

THIS was an appeal motion from a decision of Vice-Chancellor *Malins* (1). The turn which the case took on appeal makes it necessary to state some additional facts. Statement.

(1) 1 Ch. D. 454.

C. A. 1876 EDWARDS v. EDWARDS. Statement.

The bill was filed by the Plaintiffs to enforce a security given to their testator, *Frederick Howarth Edwards*, under the following circumstances:—*F. H. Edwards* in 1869 was carrying on business as a printer on leasehold premises in *London*, and he agreed with the Defendant to sell the premises and the business to him for £8000, it being arranged that £7500, part of the purchase-money, and £6500 already due from the Defendant to *Edwards*, should remain on security. By deed dated the 1st of July, 1869, reciting the agreement for purchase, and that £500 should be paid down, and £7500 allowed to remain on such security as thereinafter mentioned, *Edwards* assigned to the Defendant the leasehold premises, machinery, fixtures, and effects, and the goodwill of the business. By the same deed the Defendant covenanted that he would pay to *Edwards* the £7500 on the 31st of December then next, with interest; and that if the £7500 or any part of it remained unpaid after that day, the Defendant would pay interest half-yearly. By a further witnessing part the Defendant covenanted with *Edwards* that if default should be made in payment of the £7500, or the interest thereof or any part thereof respectively, on the 31st of December then next, the printing-office and hereditaments, with the appurtenances, as well during the continuance of the then lease as during the renewal or extension of such lease, and the plant, machinery, furniture, fixtures, and effects, then or thereafter to be in or about the same, or used in connection with the business, and the book debts then or thereafter owing or belonging to the business should, as long as the £7500, or any part thereof, or any interest for the same, should remain unpaid, stand and be charged and chargeable with the payment of the £7500, or so much thereof as should for the time being remain unpaid, and the interest thereof, and that the Defendant, his executors, administrators, and assigns, would at his and their own expense, if and when they should be required to do so by *F. H. Edwards*, his executors, administrators, or assigns, execute and do all such things as should be necessary or proper for granting and assigning the said premises respectively, and every or any part thereof, to *F. H. Edwards*, his executors, administrators, or assigns, for further securing the repayment to him or them of the £7500, or so much thereof as should for the time being remain unpaid, and the interest thereof.

On the same day another deed was executed, by which the £6500 was secured in precisely the same way upon the same property.

Neither of these deeds was registered as a bill of sale.

The Defendant upon the execution of these deeds entered upon the property, and carried on the business.

Statement.

In December, 1872, *F. H. Edwards* died; and the interest having fallen into arrear, his executors, on the 26th of July, 1875, filed their bill to enforce their securities, asking, among other things, for the appointment of a receiver.

On the 29th of July, 1875, the Plaintiffs, on affidavit of service of notice, obtained an order "that *C. E. Mason*, upon his giving security, be appointed receiver" of the rents of the leasehold property and of the assets of the business, and manager of the business. He completed his securities on the 25th of August, and this was certified on the 3rd of September.

Mason had for some months before the institution of the suit superintended the business on behalf of the Plaintiffs and other creditors of the Defendant, but the business was ostensibly carried on by the Defendant, and after the order of July, 1875, no change was made which could inform the public or persons dealing with the Defendant that a receiver was in possession.

On the 4th of August, 1875, after the order appointing the receiver, but long before he had completed his securities, the Sheriff of *Middlesex* seized the plant and business effects under a writ of *fi. fa.* issued on a judgment obtained by *Soper* and *Lovell* against the Defendant.

Soper and *Lovell* had full notice in 1873 of the Plaintiffs' securities. The debt in respect of which the *fi. fa.* was issued was not contracted till 1875.

Vice-Chancellor *Malins* held that the receiver was to be considered as duly appointed from the date of the order appointing him, and that *Soper* and *Lovell* had been guilty of contempt of Court in taking the goods in execution, but directed an inquiry whether they had any interest in the chattels.

Soper and *Lovell* appealed.

Glasse, Q.C., and *Langley*, for the Appellant:—

Argument.

The Appellant claims under an agreement for a bill of sale which

C. A.
1876
EDWARDS
v.
EDWARDS.
Argument.

requires registration: *Ex parte Mackay* (1). The Respondents refer to *Brown* v. *Bateman* (2) as shewing that this is not a bill of sale within the Act; but it is inapplicable. The bill of sale, then, is no protection against us unless real possession was taken under it; but the possession taken was merely colourable. Then, as to the contempt, the receiver is appointed receiver conditionally on his giving security, and he is no receiver till he has given it.

Locock Webb, Q.C., and *Sangster Green*, for the Plaintiffs:—

This is not a bill of sale within the Act, for it gives no right to take possession.

[MELLISH, L.J.:—Then how can you come to the Court to get possession by means of a receiver?]

That is only a process of the Court to give effect to a charge. The order for a receiver was not a consent order, the suit being a *bonâ fide* suit by the executors to protect their testator's estate. Then we submit that the Vice-Chancellor was right in holding the receivership to exist from the date of the order. There are two forms: *Seton* on Decrees (3); in one case there being two orders, in the other only one. The receiver having been appointed by name, can act before giving security. Where there are two orders, no doubt the appointment cannot date from the first; but where there is only one, there is nothing but the date of the order to which it can be referred. *Wickens* v. *Townshend* (4) and *Defries* v. *Creed* (5), which were referred to below on behalf of the Appellant, are in our favour.

[JAMES, L.J.:—I think it should be referred to the date of the certificate that security has been given.]

Then we contend that the *Bills of Sale Act* cannot apply to avoid this security for the benefit of the Defendant, since he had notice of it when the debt was incurred. The case is not within the mischief against which the Act was intended to guard, the deceiving creditors by secret bills of sale. There is no decision on the point. In *Reeve* v. *Whitmore* (6) Lord *Westbury* attaches impor-

(1) Law Rep. 8 Ch. 643.
(2) Ibid. 2 C. P. 272.
(3) 3rd Ed. p. 1004.
(4) 1 Russ. & My. 361.
(5) 34 L. J. (Ch.) 607.
(6) 4 D. J. & S. 1.

tance to notice. In *Le Neve* v. *Le Neve* (1) notice was held to take a case out of the *Middlesex Registration Act*. This case has been followed, and is strongly analogous to the present.

JAMES, L.J.:—

The question here is, who has the better right to certain chattels, a mortgagor whose bill of sale is not registered but who has obtained an order for a receiver, or an execution creditor of the mortgagor? and we are of opinion that the case can be disposed of without directing any inquiry. I was at first much struck with the point taken by Mr. *Locock Webb*, that an unregistered bill of sale is good as against an execution creditor who at the time when his debt was incurred knew of the bill of sale, such a case not being within the scope of the Act, as he cannot be misled if he knows of the charge to which his debtor's goods are subject; but I think that it would be dangerous to engraft an equitable exception upon a modern Act of Parliament. The Act provides that a bill of sale shall be registered within twenty-one days, "otherwise such bill of sale shall as against all sheriffs' officers and other persons seizing any property or effects comprised in such bill of sale, in the execution of any process of any Court of law or equity authorizing the seizure of the goods of the person by whom or of whose goods such bill of sale shall have been made, and against every person on whose behalf such process shall have been issued, be null and void to all intents and purposes whatsoever, so far as regards the property in or right to the possession of any personal chattels comprised in such bill of sale, which at the time of executing such process, and after the expiration of the said period of twenty-one days shall be in the possession or apparent possession of the person making such bill of sale, or of any person against whom the process shall have issued under or in the execution of which such bill of sale shall have been made or given, as the case may be." The mortgagee says to the execution creditor, "You are not prejudiced, for you knew of my security." The execution creditor replies, "I knew that you had a security, but you knew the law as well as I. You knew that if I issued execution your

(1) 3 Atk. 646.

C. A. 1876 EDWARDS v. EDWARDS. Judgment, James, L.J.

security would be of no avail as to chattels of which you had not taken possession. I knew that my remedy against those chattels was liable to be defeated by your taking possession before I seized them in execution. You knew that your security was liable to be defeated by my taking them in execution before you took possession." Both parties stood on their legal rights—neither of them was misleading the other. It is not consistent with the policy of the Legislature to import fine equitable distinctions into these cases, and I am therefore of opinion that the argument founded on the knowledge of the judgment creditor cannot prevail. In my opinion, then, the judgment creditor has the better right; for I am satisfied that the possession which was taken was a mere nominal possession, such as is struck at by the Act. The possession was that of a man who before the institution of the suit went to the place two or three times a week, and afterwards went every day. It is not alleged that he ever paid the wages, or did any act shewing him to be in possession. No reply is made to the detailed affidavits shewing that there was no change in the apparent possession.

Then as regards the point on which the Vice-Chancellor decided the case, namely, that a judgment creditor cannot put in an execution after an order has been made for a receiver, I think it would be dangerous to hold that a mere consent order for the appointment of a receiver (for this virtually was a consent order) should shut out all execution creditors. A receiver becomes such on giving security. When he has done that, he can take possession. It would be very serious to hold that he can take possession before giving security. There is no reason to depart from the plain meaning of the words of the order, which appoints him receiver conditionally on his giving security. The case is the same in substance as that before Vice-Chancellor *Kindersley*. In that case there were two orders, here there is only one; in that case the appointment dates from the second order, and in this case from the certificate that the condition of giving security has been complied with. I am of opinion, therefore, that no contempt has been committed, that the execution creditor is right, and that the order of the Vice-Chancellor must be reversed.

C. A.
1876
EDWARDS
v.
EDWARDS.
Judgment, Mellish, L.J.

MELLISH, L.J.:—

I am of the same opinion. The first point argued was that this is not a bill of sale within the meaning of the Act. I am of opinion that it was, and that on two grounds. In the first place, it is an instrument under seal charging the goods with the debts. If it did not pass the property in the goods, I am inclined to think that even at law it would be held to give a right to take possession of them as a security. In the second place, it contains a covenant to assign the goods when required, which clearly gives an equitable title to them, and we have held that equitable securities on goods are bills of sale within the meaning of the Act. The statute mentions declarations of trust, which shews that equitable titles are within its scope. I think that any equitable security which gives a right to take possession through the agency of the Court is within the Act.

Then it is urged that although this instrument, which was a bill of sale within the Act, was not registered, it is good against the execution creditor, because he had notice of it when his debt was contracted. Notice he clearly had, but does that take the case out of the Act? I am of opinion that at law it clearly would not be held to do so. A Court of Law would say that the case was within the plain words of the Act, and would not alter them because it was not exactly within the mischief against which the Act was intended to guard. I am not sure that it is not within the spirit of the Act as well as the letter, for we know how difficult a subject notice is, and how many questions would arise if the doctrine of notice were to be introduced, and a Court of Law certainly would see no reason for departing from the plain words of the Act. Then, is a Court of Equity to act differently? I agree with the Lord Justice *James* that we ought not to put such constructions on modern Acts of Parliament. If the Legislature says that a deed shall be "null and void to all intents and purposes whatsoever," how can a Court of Equity say that in certain circumstances it shall be valid? The Courts of Equity have given relief on equitable grounds from provisions in old Acts of Parliament; but this has not been done in the case of modern Acts, which are framed with a view to equitable as well as legal doctrines. If the Act had said, "shall be void at law and in equity," the question

C. A. 1876 EDWARDS v. EDWARDS. Judgment, Mellish, L.J.

could not have been raised, and what it has said comes to the same thing.

Then, was possession really taken? If the receiver had really taken possession before the goods were seized, then, although he had not been completely appointed receiver, still, as possession would have been taken on behalf of the mortgagee, I should think that the case would have been taken out of the Act. But I am of opinion that the possession taken was merely formal, nothing having been done to shew the world at large that there was any change of possession.

Baggallay, J.A. BAGGALLAY, J.A.:—

I am of the same opinion, and for the same reasons.

Solicitors: *Dod & Longstaffe; William Maynard.*

C. A. 1876 *March* 14.

JOHNASSON *v.* BONHOTE.

[1874 J. 50.]

Demurrer—Answer—Objection—Appeal.

After a demurrer had been overruled the bill was amended, and the Defendant answered, not taking in his answer the objection which had been raised on the demurrer:—

Held, that the Defendant might at the hearing take the same objection.

Decree of *Jessel*, M.R., reversed.

Statement. THE bill in this case was filed by *John Johnasson* against *Thomas Bonhote*, for the specific performance of an agreement to purchase a house and furniture in *Gloucester Square, London*. The bill alleged certain interviews and correspondence between the Plaintiff and Messrs. *Mullett, Booker, & Co.*, his house agents, and Messrs. *Shum & Crossman*, his solicitors, and Mr. *Rose*, the solicitor for the Defendant, as constituting an agreement. To this bill the Defendant demurred, and for cause of demurrer shewed that there was no contract or memorandum signed by the Defendant within the meaning of the *Statute of Frauds*. The demurrer was on the 25th of May, 1874, overruled by the Master of the Rolls (Sir

G. Jessel), but his Honour made the costs costs in the cause on the ground that the alleged contract was founded on letters in an imperfect way.

Statement.

The bill was then amended, and the suit came to a hearing, the principal defence being that certain statues, ornamental clocks, and other articles, had been taken away by the Plaintiff as not included in the alleged contract, whereas the Defendant maintained that they were included, and that he ought not to be compelled to perform the contract otherwise. The Defendant did not by answer plead the *Statute of Frauds*, or claim the same benefit as if he had demurred.

The Master of the Rolls, on the 10th of November, 1875, made a decree for specific performance, with compensation for the articles removed, and ordered the Defendant to pay the costs of the suit. His Lordship thought that the articles taken away by the Plaintiff had (with the exception of a very small and immaterial portion) been excluded from the contract. His Lordship observed that the question as to the *Statute of Frauds* had been already discussed on the demurrer, and was not then raised before him; and that as there had been no appeal his decision must for that purpose be accepted.

From this decree the Defendant appealed.

Argument.

Fischer, Q.C., and *Badcock*, for the Appellant, contended that the articles taken away by the Plaintiff were included in the contract, and that the Defendant was not bound to perform the contract without getting them. They also contended that there was no sufficient writing within the *Statute of Frauds*.

Chitty, Q.C., and *Caldecott*, for the Plaintiff:—

The question as to the *Statute of Frauds* was disposed of by the demurrer, and cannot now be raised. The amendments do not at all affect that question, and in any case, after the amendments the Defendant ought to have demurred again if he meant to rely on that defence: *Skinner* v. *M'Douall* (1). *Ridgway* v. *Wharton* (2) is disapproved of in *Heys* v. *Astley* (3). At all events, the De-

(1) 2 De G. & Sm. 265. (2) 3 D. M. & G. 677.
(3) 4 D. J. & S. 34.

C. A. 1876

JOHNASSON v. BONHOTE.

Judgment, James, L.J.

fendant ought to have appealed from the order overruling the demurrer.

JAMES, L.J.:—

This case has been very fully, very elaborately, and very ably argued, and I have arrived at the conclusion that the decision of the Master of the Rolls cannot be supported.

The Master of the Rolls, upon hearing the case, evidently followed, and thought it necessary to follow, his decision upon the demurrer which was to the original bill, and I am of opinion that that original decision upon the demurrer was not well founded—that too much was inferred and too much was guessed by way of inference for the purpose of making out that to be an agreement in writing alleged by the original bill which was not an agreement in writing. The agreement, so far as it is an agreement, is made out of letters. [His Lordship then stated the letters and their effect, coming to the conclusion that a certain necessary paper was not referred to in the letters, and that there was not any sufficient agreement in writing to comply with the requisites of the *Statute of Frauds*.] It was said that it was now too late to take the objection, because the objection was not taken by the answer, and with reference to that point of pleading and practice several cases have been cited to us which are not altogether consistent with one another, the preponderance of authority being, no doubt, that the objection must be taken on the pleadings, otherwise it cannot be taken for the first time at the hearing; and probably if the thing had stood there it might have been too late to take the objection. But I cannot conceive that that rule can by any possibility apply to a case in which the objection has been actually taken by demurrer on the very ground that there is not an agreement within the *Statute of Frauds*, and that demurrer has been overruled by the Court below, from whose ultimate decision the appeal is now made to us. The reason why the objection must be taken before the hearing, or taken by answer if not previously, is, that possibly the Plaintiff might have amended his bill by alleging a parol agreement part performed, or something which would have enabled him to complete his case, if that objection was meant to be taken. But if the objection on the *Statute of Frauds*

had been clearly and distinctly taken by demurrer, although that demurrer has been overruled, it seems to me it would be idle to require a man to repeat the demurrer when some additional thing not affecting the statement of the contract has been put in by way of amendment, or to make it necessary for him by his answer to the interrogatories to repeat that as to which he has already given distinct notice to the Plaintiff, that he insisted upon, and means to insist upon it, namely, that there is no contract within the *Statute of Frauds*. No authority has been cited which shews that a man is obliged to go on repeating an objection once clearly and distinctly taken. I am of opinion, therefore, if the case depended upon this point, that it is not now too late to repeat the objection which was taken in the Court below upon demurrer, or too late to give leave to appeal from the demurrer so as to take it again, because I cannot conceive that it would be right to allow a man who has taken an objection to lose it because he has not gone on verbosely to repeat it a second time on a subsequent occasion.

I do not think it necessary absolutely to determine the question upon the *Statute of Frauds*, because it appears to me, now that we have the whole of the correspondence and evidence before us, that the two parties never were *ad idem*, and that they really never meant to bind themselves to the same contract, or to the same thing. [His Lordship then stated the facts in the case.]

I am of opinion, therefore, that the Plaintiff has not made out the agreement for the sale of the house and furniture, as alleged by the bill; and having failed in that, I am of opinion that the suit ought to be dismissed, and dismissed with costs.

MELLISH, L.J.:—

I am of the same opinion.

BAGGALLAY, J.A.:—

I also am of the same opinion.

Solicitors: *Shum, Crossman, & Crossman; Cope, Rose, & Pearson.*

C. A.
1876
March 16.

TAYLOR *v.* ECKERSLEY.

[1876 T. 65.]

Practice—Receiver—Interim Appointment of Plaintiff—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8—*Rules of Court*, 1875, *Order* LII., *r.* 4.

In an action to enforce specific performance of a parol agreement to execute a bill of sale of personal chattels, upon an *ex parte* motion before appearance of the Defendant, there being evidence of immediate danger of the chattels in question being disposed of, an order was made appointing the Plaintiff (without security) interim receiver for fourteen days, or until a receiver should be appointed under a reference to Chambers for that purpose which the Vice-Chancellor had directed. The Plaintiff undertook to deal with the property only under the direction of the Court, and to abide by any order which the Court might make as to damages or otherwise.

Statement.

THE writ in this action was issued on the 13th of March, 1876, by *R. T. Taylor* against *W. M. Eckersley*. Both the Plaintiff and the Defendant were traders at *Barrow-in-Furness*. The claim indorsed on the writ was, 1, for the specific performance of an agreement entered into by the Defendant to execute a bill of sale of his furniture to secure the Plaintiff against certain liabilities; 2, to be deemed in the meantime to be a mortgagee by agreement of the furniture for the purposes of such security; 3, for an injunction to restrain the Defendant from parting with any of the furniture; and, 4, to have a receiver of the same.

On the 16th of March the Plaintiff moved *ex parte* before Vice-Chancellor *Bacon* for an injunction and receiver. The Defendant had not appeared to the writ.

By the evidence in support of the motion it appeared that in February, 1875, the Plaintiff had joined with the Defendant in signing a joint and several promissory note for £850, payable on demand to Messrs. *Boddington & Co.*, who had lent that sum to the Defendant to enable him to purchase a public-house, and that the Plaintiff had consented to do this on the faith of a verbal promise by the Defendant to give him a bill of sale of his furniture as a security against liability on the note. The bill of sale was afterwards prepared and engrossed, but the Defendant refused to execute it, though it had been frequently tendered to him for

Scott cited pr 5 Ch D. 740 HR. VCB

that purpose. On the 25th of February, 1876, he wrote a letter to the Plaintiff, in which he promised to execute the bill of sale in a few days. On the 10th of March it was tendered to him, and he again refused to execute it. *Boddington & Co.* had recently given notice to the Plaintiff that they intended to sue him upon the note.

Statement.

The Plaintiff deposed that he verily believed that, unless restrained from doing so, the Defendant would sell or dispose of the furniture.

On the 15th of March, 1876, the Plaintiff's country solicitors wrote a letter to their *London* agents, in which they said, "We believe certain parties in *Barrow* and elsewhere are about to make the Defendant bankrupt, and he is about to leave *Barrow*." This letter was not in evidence, but it was read by the Plaintiff's counsel.

The Vice-Chancellor granted an injunction on the usual undertaking as to damages, but refused to make any order for a receiver, except the common reference to Chambers to appoint one.

The Plaintiff renewed his application by way of appeal.

Argument.

Russell Roberts, for the Plaintiff:—

What we desire is an immediate protection to the property, which is not only in peril from the Defendant himself, but may be exposed to risk if he is adjudicated a bankrupt, and may be taken in execution by his creditors. According to the recent decision of this Court in *Edwards* v. *Edwards* (1), a receiver appointed in the ordinary way is not entitled to take possession until he has perfected his security.

Judgment, James, L.J.

JAMES, L.J.:—

Under the circumstances, the Plaintiff may be appointed (without giving security) interim receiver for fourteen days, or until a receiver is appointed under the Vice-Chancellor's order, the Plaintiff, through his counsel, undertaking not to deal with the property except under the direction of the Court, and to abide by any order which the Court may think fit to make as to damages

(1) *Ante*, p. 291.

C. A. 1876 TAYLOR v. ECKERSLEY.

or otherwise. We do not interfere with the order of the Vice-Chancellor; we only make this addition to it.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors: *Chester, Urquhart, & Co.*, agents for *Bradshaw & Pearson, Barrow-in-Furness.*

C. A. 1876 *March* 17.

HASTIE *v.* HASTIE.

[1875 H. 256.]

Agreement for Settlement—Lien on Unsettled Property—Practice—Inrolment of Decree.

Immediately before a marriage the intended husband signed a memorandum agreeing that certain bonds (in the memorandum called "stocks"), which were part of the wife's property, should be transferred to the wife and her son by a former marriage in trust for her, "neither party having power to dispose of the said stocks without consent of both parties to such disposal." After the marriage the husband obtained possession of part of these bonds without the consent of the son, and disposed of them:—

Held (affirming the decision of *Malins*, V.C.), that the husband was liable to make good the amount of the bonds so disposed of by him, and that the wife and her trustee were entitled to a lien for the amount upon all other property of the wife which remained in specie, and that the amount must be settled.

Under the Judicature Acts the inrolment of a decree has no effect in preventing an appeal.

Statement.

THIS was an appeal by the Defendant *Hastie* from a decree of Vice-Chancellor *Malins.*

On the 9th of November, 1874, the Plaintiff, Mrs. *Hastie* (then *Hannah Eliza St. Auburn*, widow), who was absolutely entitled to personal estate to the amount of about £25,000, intermarried with the Defendant *Hastie.* Previously to the marriage a memorandum, dated the 7th of November, 1874, was signed by *Hastie*, which was as follows:—

"In consideration of my marrying *Hannah Eliza St. Auburn*, I hereby agree to the transfer of the following stocks, namely, £5000 Russian, 1862; £1000 Brazilian, 1865; £4000 Portuguese,

1853 and 1869; and £1000 Japanese, 1873—the said stocks being now in the possession of the said *H. E. St. Auburn*—into the names of the said *H. E. St. Auburn* and *William Toone St. Auburn*, her son, in trust for herself. Neither party having power to dispose of the said stocks without consent of both parties to such disposal."

The properties called stocks in the above memorandum were, in fact, bonds transferable by delivery, and all of them, except the Russian bonds, were in the hands of the *Union Bank* on behalf of Mrs. *Hastie*. On the same 7th of November Mrs. *Hastie* gave to her nephew, *C. P. Sclater*, the £5000 Russian bonds, with a note addressed to the manager of the *Union Bank*, which was as follows:—

"I shall be obliged by your holding in future the following bonds in the names of myself and my son, Mr. *W. Toone St. Auburn*, neither of us to be able to withdraw the same without the consent of the other. The coupons, as they become due, to be placed to my own account. £1000 Japanese, £1000 Brazilian, £4000 Portuguese, £5000 Russian. The three first now in your hands and the last Russian will be delivered to you by my nephew, Mr. *C. P. Sclater*."

On the 9th of November *Sclater* took the Russian bonds and this note to the *Union Bank*. The manager perused the note, and refused to receive the bonds on the footing of it. *Sclater* accordingly took both the note and the Russian bonds back to Mrs. *Hastie*, and at the time when the bill was filed they were under the control of herself and her son.

The other bonds mentioned in the memorandum of the 7th of November, 1874, were removed by *Hastie* from the *Union Bank*, and he deposited them—some in January, 1875, and the rest in February, 1875—with the *National Bank*, who claimed a lien on them along with other securities for advances made by them to *Hastie*. It was disputed whether this removal took place with the knowledge and consent of Mrs. *Hastie*, but it took place without the knowledge or consent of *William Toone St. Auburn*.

Mrs. *Hastie*, at the time of her marriage, was entitled to a leasehold house in *London*, held for a long term at a ground rent.

C. A. 1876 HASTIE v. HASTIE. Statement.

Hastie had entered into the receipt of the rent of this house, and was in possession of some furniture belonging to her. He had employed the rest of the fortune of Mrs. *Hastie* not comprised in the memorandum in unsuccessful speculations.

On the 29th of October, 1875, Mrs. *Hastie* and *W. Toone St. Auburn* filed their bill against *Hastie* and one of the registered public officers of the *National Bank*, to have the securities mentioned in the memorandum of November, 1874, which had been dealt with by *Hastie*, replaced, to have a settlement executed of them, and to have a lien established upon the leasehold house and the other property of Mrs. *Hastie* not included in the memorandum for the amount of the property comprised in the memorandum of November, 1874, of which *Hastie* had obtained possession.

The *National Bank*, it appeared, had taken the bonds *bonâ fide* in the ordinary course of business, so that their title was preferable to that of the Plaintiffs.

On the 9th of December, 1875, Vice-Chancellor *Malins* made a decree dismissing the bill with costs as against the officer of the *National Bank*, and declaring the Defendant *Hastie* liable to make good to the Plaintiffs all the funds comprised in the memorandum of the 7th of November, 1874, except the £5000 Russian bonds. The decree then directed an inquiry as to the value on the 29th of October, 1875, of the funds comprised in the memorandum other than the Russian bonds, and ordered *Hastie*, within seven days after the date of the certificate, to pay the amount to the Plaintiffs, or to the Plaintiff *W. Toone St. Auburn*. It was then declared that the Plaintiffs had a charge upon the leasehold house, upon the furniture, and (subject to the prior claim of the *National Bank*) upon the securities deposited by *Hastie* with the *National Bank* other than the Russian bonds, for the sum which *Hastie* was to make good, and in default of his paying it, liberty was given to the Plaintiffs to apply in Chambers to enforce the lien. It was declared that *Hastie* did not, under the memorandum of the 7th of November, 1874, become entitled to any interest in the securities specified therein, and it was ordered that he should execute a proper settlement, to be approved by the Judge, of the property comprised in the memorandum, or what was applied in making good the amount thereof which had been disposed of by *Hastie*.

Hastie was ordered to pay the Plaintiffs' costs and the costs which they had been ordered to pay to the *National Bank*.

This decree was inrolled. *Hastie* appealed against it.

Glasse, Q.C., took the preliminary objection that the decree had been inrolled.

JAMES, L.J.:—

That is immaterial. The inrolment of a decree under the old practice prevented the Court of Chancery from rehearing its own decree. But what you are now contending for comes to this, that the High Court of Justice, by inrolling its own decree, abridges the powers of the Court of Appeal. Inrolment is now a useless ceremony.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Argument.

J. Pearson, Q.C., and *Everitt*, for the Appellant, contended that the fund was not so settled, but that the husband and wife together could dispose of it, and that the wife had, upon the evidence, concurred in the husband's dealing with it.

Glasse, Q.C., and *Phillpott*, for the Plaintiffs, were not called upon, except as to a point relating to costs.

Judgment, James, L.J.

JAMES, L.J.:—

In this case it appears that the Appellant was desirous of marrying a lady of fortune, and a lady of fortune was desirous of having him as a husband. It is clear that he was disposed, if he could, to marry her without making any settlement, and, as far as has been made out, she herself would not have been unwilling to have accepted him upon those terms, but she had friends and relations who were more prudent than herself, and on the eve of the marriage a nephew and her son interfered, and just on the Saturday before the marriage, which took place on Monday, a settlement was made of part of her fortune. Great part of it the Appellant insisted on having entirely under his own control, subject to an obligation merely honorary, that whatever he made of it he would

C. A. 1876 HASTIE v. HASTIE. Judgment, James, L.J.

leave to her if she survived him, but the friends who interfered thought it was necessary at all events to tie up part of the property, and out of £25,000 £10,000 was tied up by a settlement which is evidenced by two documents, one signed by the intended husband, and the other signed by the intended wife, both of them being parts of the same transaction, referring to the same funds, and agreeing in substance with one another. The husband says: "In consideration of my marrying *Hannah Eliza St. Auburn*, I hereby agree to the transfer of the following stocks" (and then names them) "into the names of *Hannah Eliza St. Auburn*, and *William Toone St. Auburn*, her son, in trust for herself, neither party having power to dispose of the said stocks without the consent of both parties to such disposal." At the same time, almost at the same moment, the lady wrote a letter to the bankers, who had got all but one of the funds in their hands, to hold those, and receive some others in the joint names of herself and her son, not to be disposed of by either of them without the consent of the other. I am of opinion both those documents mean the same thing, that is to say, that the funds are to be in trust for the lady, but not to be disposed of without the consent of the son as well as the lady. This Mr. *Pearson* said was to be a trust for the lady's separate use, and she was to have the absolute power of disposing of the fund. I do not think so; whether she meant it or not, the true construction of the documents, in my opinion, is, that she was not to have the power of disposing of the fund of her own mere will, without the consent of the trustee; there was a provision intended to be a fetter and guard upon her, so as to protect that part of the property from the husband's speculations, he being at liberty to speculate according to his own will and pleasure with the rest of the property, by far the larger half of it. That being so, the property never was transferred in this way. These funds, all but the £5000 stopped *in transitu*, have found their way into the hands of the Appellant, who has obtained and has dealt with what was intended to be the subject of that settlement, without any legal or proper authority. It appears to me that that being so, those moneys ought to be forthcoming, to be paid into a trust, a proper trust, according to that agreement, and if they are not forthcoming the husband must make them good. The Vice-Chancellor goes

on to declare that this amount is a charge also on the rest of the lady's property. I am of opinion that the Vice-Chancellor is right in this, for the husband having agreed before marriage that a certain part of his wife's fortune should be exempted from his marital power and set apart for her, if by his conduct afterwards it is not forthcoming, this Court will not allow him to retain the rest of her fortune, which ought to make good the equivalent of that which he bargained to allow to be settled upon her. If that is so, the wife's right is to have the money made good in the manner in which the Vice-Chancellor has directed it, by the personal liability of the husband, and out of the remaining part of the wife's property, and the husband must pay the costs of the suit, which has been rendered necessary for the purpose of recovering the money. I think the Vice-Chancellor was also right in making him pay the costs of the bank. The appeal must, in my opinion, be dismissed with costs, but the decree must not be enforced personally against the Appellant without leave of the Court, the object being that the securities in the hands of the bank may be realized, and proceedings taken against the Appellant for the deficiency only.

MELLISH, L.J.:—

I am of the same opinion.

BAGGALLAY, J.A., concurred.

Solicitors: *Walker & Martineau; William Tatham & Sons.*

C. A.
1876
March 17, 18, 20.

FINCH *v.* UNDERWOOD.

[1875 F. 96.]

Renewal of Lease—Condition Precedent—Lease to Two.

12 Ch D. 466-5
18 Ch D 241-2
24 [illegible]

A lease was granted to two, with a proviso for re-entry in case the rent should be in arrear for thirty days, or the tenants or either of them should become bankrupt, or let, assign, or part with the premises, or any part thereof, without license; or if the tenants should not keep the covenants (which were joint and several covenants), one of which was to keep the interior of the property in repair. The landlord covenanted that he would, at the expiration of the term (in case the covenants on the tenants' part should have been duly performed), grant to "the tenants, their executors and administrators," a fresh lease, subject to the same covenants, provided the tenants or either of them, their or either of their executors or administrators, should, twenty days before the end of the term, give the landlord notice of the desire to take such lease. One of the tenants became bankrupt, shortly before which he assigned his interest in the lease to the other tenant. The landlord, with knowledge of this, received rent to the end of the term. The continuing tenant, twenty-one days before the end of the term, gave the landlord notice to grant the renewed lease to him. At this time the interior of the property required repairs to the amount of at least £13. *Malins*, V.C., decided that the lease must be granted, the repairs required being only trifling:—

Held, on appeal, that the tenant was not entitled to a renewed lease, for that, 1, the granting it was subject to a condition precedent that the covenant of the lease should have been kept, which condition had not been performed, as there was a want of repair which, though not serious, constituted an existing breach of covenant when the new lease was applied for; and, 2, the agreement being to grant a lease to the two, who must enter into joint and several covenants, and both being alive, the landlord could not be called upon to grant a lease to one only.

Statement.

THIS was an appeal by the Defendant from a decree of Vice-Chancellor *Malins*.

By an indenture dated the 31st of August, 1868, made between the Defendant of the one part, and the Plaintiff and *Frederick Head* of the other part, the Defendant demised certain premises at *Eastbourne* to the Plaintiff and *Head*, their executors and administrators, for the term of seven years from Midsummer Day, 1868, at the rent of £65, payable half-yearly on the 24th of June, and the 25th of December, subject to a proviso that if the rent,

or any part of it, should be in arrear for thirty days, or if "the tenants, or either of them, their or his executors or administrators, shall become bankrupt, or compound with their or his creditors, or make any assignment for the benefit of their or his creditors, or cause or permit or suffer these presents, or the hereby demised premises or any part thereof, to be seized or taken in execution, or if the said tenants or either of them, their or either of their executors or administrators, shall let, set, assign over, or otherwise part with the hereby demised premises, or any part thereof, to any person or persons without the consent of the said landlord, his heirs or assigns, for that purpose first had and obtained in writing under his or their hand or hands; or if the said tenants, their executors or administrators, shall not well and truly observe, perform, fulfil, and keep all and singular the covenants and agreements hereinafter reserved and contained on their part and behalf (save and except the covenant for payment of rent), then and in either of those cases it shall and may be lawful for the landlord" [power of re-entry.] The tenants jointly and severally covenanted to pay the rent and all rates, taxes, &c.; to paint the inside work once during the term, and keep and leave the interior in good repair, except in case of damage by fire; that it should be lawful for the landlord, his heirs, &c., to enter and view the state of the premises twice in the year, and to give notice in writing of want of paint or repairs of the interior, which want of paint and repairs the tenants covenanted to have amended, done, and performed within one month after notice; and that no trade or business should be carried on upon the property without the written consent of the landlord, his heirs or assigns. Among the covenants on the part of the landlord was a covenant that he, his heirs or assigns, "shall and will, at the expiration of the term hereby granted (in case the covenants and agreements on the said tenants' part shall have been duly observed and performed), grant unto the said tenants, their executors and administrators, at their expense, a fresh lease of the hereby demised premises for any term not exceeding fifteen years, at the annual rent of £70, payable half-yearly, and under and subject to the same covenants and conditions as are herein contained, provided the said tenants or either of them, their or either of their executors or administrators, shall,

C. A. 1876 FINCH v. UNDERWOOD. Statement.

twenty-one days before the expiration of the term hereby granted, give unto the said landlord, his heirs or assigns, a notice in writing, under their or his hands or hand, of the intention and desire to take such fresh lease;" and a covenant that if during the original term the tenants or either of them, their or either of their executors or administrators, should be desirous of purchasing the property for £1100, and should give such notice as therein mentioned, then the said tenants or tenant, their or his executors or administrators, should be entitled to purchase the property at that sum.

On the 9th of December, 1869, *Head* assigned all his interest in the property to the Plaintiff without any license from the Defendant, and shortly afterwards became bankrupt. The Plaintiff continued in possession, and the Defendant received rent after notice that *Head's* interest had become vested in the Plaintiff.

On the 24th of May, 1875, the Plaintiff served upon the Defendant a notice, the material parts of which were as follows: "I, *Edward James Finch*, by virtue of the power or authority given to me by an indenture of lease dated 31 Aug. 1868, made between you, *H. Underwood*, of the one part, and me, the said *E. J. Finch*, and *F. Head* of the other part, hereby give you notice that I desire to take a fresh lease of the premises comprised in the above indenture of lease for the term of fifteen years, commencing at the expiration of the above lease, at the rent and on the terms mentioned in the said lease, and I require you to grant me such fresh lease accordingly."

On the 24th of June, 1875, the Defendant's solicitor replied that the Defendant had six times been obliged to distrain for rent, and that the interior of the premises was out of repair, for which an action would be brought, and that the Defendant therefore declined to renew.

It appeared that a distress had actually been levied four times, and that on two other occasions a bailiff went to distrain, but the rent was paid before the levy was actually made. It was also clearly shewn that the interior was out of repair. The Defendant's surveyor estimated the expense of the requisite repairs at £45 4*s.* 9*d.*; the Plaintiff's surveyor at £20. A builder confirmed the report of the Plaintiff's surveyor as to the repairs required, and deposed that he could do them properly for £13 10*s.*

C. A. 1876 FINCH v. UNDERWOOD.

The Defendant having brought ejectment, the Plaintiff filed his bill to restrain the action, and to obtain specific performance of the contract to grant a renewed lease. A motion for injunction was made, the hearing of which was by consent treated as the hearing of the cause.

Statement.

Vice-Chancellor *Malins*, on the 21st of December, 1875, held that the Defendant was bound by the terms of the covenant to grant a lease to the Plaintiff without the concurrence of *Head*, and that as the want of repair was trifling, it furnished no ground of defence. A decree was accordingly made with costs, declaring the Plaintiff entitled to a lease, and ordering the Defendant to execute it, and restraining the Defendant from issuing execution on the judgment which had been entered upon in the action.

The Defendant appealed.

Argument.

Glasse, Q.C., and *Kingdon*, for the Appellant:—

We say, first, that the option to renew was subject to a condition precedent which has not been performed: *Weston* v. *Collins* (1); *Davis* v. *Thomas* (2). There is a distinction between relieving against forfeiture and enforcing a privilege. The Vice-Chancellor relied on *Hare* v. *Burges* (3). The form of covenant does not appear there, but from a report relating to the same lease (4) it appears that there was no condition precedent in that case, which therefore does not rule the present case; nor was there any condition for re-entry. *Job* v. *Banister* (5) and *Grey* v. *Friar* (6) shew how conditions precedent of this kind are dealt with. Then, moreover, the lease was only to be granted to both—the language of the covenant for renewal being quite different from that of the option to purchase which is given to either; and this is fortified by the observation that there is a covenant against assignment which had been broken so as to cause a forfeiture: *Varley* v. *Coppard* (7).

Bristowe, Q.C., and *Dundas Gardiner*, for the Plaintiff:—

The condition against assignment is a penal clause, and to be construed strictly, and its wording here is such as, on a reasonable

(1) 13 W. R. 510. 11 Jur N.S. 190
(2) 1 Russ. & My. 506.
(3) 5 W. R. 585. 3 Jur N.S. 1294
(4) 4 K. & J. 45. 3 Jur N.S. 1294
(5) 2 Ibid. 374.
(6) 4 H. L. C. 565. 18 Jur 1036
(7) Law Rep. 7 C. P. 505.

C. A. 1876

FINCH v. UNDERWOOD.

Argument.

construction, means only that there is to be no assignment to a stranger.

[JAMES, L.J.:—There is a right of re-entry on bankruptcy. Can that right be got rid of by one tenant assigning to the other?]

If not, it has been waived; for the landlord has gone on receiving rent with full notice of the circumstances. The covenants of the lease have been substantially performed, and according to *Hare* v. *Burges* (1) the renewed lease ought to be granted. A covenant to grant a renewed lease is construed with a certain degree of latitude: *Hyde* v. *Skinner* (2). A covenant to renew runs with the land: *Spencer's Case* (3). The waiver of the re-entry for breach of condition extends to the renewed lease.

18 Ch D 249

[MELLISH, L.J.:—Receipt of rent waives a forfeiture because it admits the lease to be subsisting; but does it follow from that that a condition precedent to granting a new lease is waived?]

Glasse, in reply, referred to *Say* v. *Smith* (4).

Judgment, James, L.J.

JAMES, L.J.:—

I am of opinion that this decree cannot be affirmed. The case is one of condition precedent; it is not a case of forfeiture, and none of the considerations applicable to forfeiture apply to it. A renewal of a lease is a privilege to which the tenant is to be entitled in certain circumstances and on certain terms. The covenant here was that on the request of either of the tenants the landlord would (the covenants of the lease having been duly kept) grant a renewed lease to the two. I am of opinion that the lessor is entitled to say that, as there were two tenants in the original lease who entered into joint and several covenants, and his agreement was in terms to grant the renewed lease to the two subject to the same covenants, he is entitled to have the joint and several covenants of the two in the renewed lease. We need not enter into the question how the case would stand if one of the lessees

(1) 5 W. R. 585. 3 Jur. N.S. 1294 (3) 1 Sm. L. C. 5th Ed. p. 53; 7th Ed. p. 72.
(2) 2 P. Wms. 196.
(4) Plowd. 269, 272; 5 Vin. Abr. p. 87, par. 6.

had died; they are both living, and it is impossible to say that one of them, the other not choosing to join, can, under the terms of this covenant, require a lease to be granted to himself. The lease which the lessor agreed to grant is not the same kind of lease as is asked for by this bill.

Judgment, James, L.J.

I think, moreover, that the Plaintiff, if otherwise entitled to a lease, would have lost that right by breach of the covenants to repair. No doubt every property must at times be somewhat out of repair, and a tenant must have a reasonable time allowed to do what is necessary: but where it is required as a condition precedent to the granting a new lease that the lessee's covenants shall have been performed, the lessee who comes to claim the new lease must shew that at that time the property is in such a state as the covenants require it to be. He can easily send in his builder, get a report of what repairs are necessary, and do them before he applies for the lease. There is no hardship in requiring this of him, and I think he is not entitled to excuse himself by saying that the want of repair is trifling. The answer to that is, "No matter; your bargain was to leave the property in thorough repair." If he has not fulfilled his legal bargain, which is also his bargain in equity, he cannot sustain his claim for a lease. The case of *Hare* v. *Burges* (1), on which the Vice-Chancellor relied, was not a case of condition precedent, and the only point decided was that there were in that case no equitable grounds for declining to enforce a contract which was good at law. The decree must be reversed, and the bill dismissed with costs.

Mellish, L.J.

MELLISH, L.J.:—

I am of the same opinion. The tenant must take the covenant to renew as he finds it; if it contains conditions precedent he must comply with them before he can claim the benefit of it, and if he has not done so a Court of Equity cannot relieve him. Under the terms of the covenant in the present case the lease is to be granted only in case the covenants and agreements on the part of the tenants shall have been duly observed and performed. What does that mean? I think it does not mean that the tenants must have strictly observed and performed the covenants all through the

(1) 5 W. R. 585.

C. A. 1876 FINCH v. UNDERWOOD. Judgment, Mellish, L.J.

term, for the expression is, "shall have been duly observed and performed;" and I think that this is satisfied if they have been so observed and performed that there is no existing right of action under them at the time when the lease is applied for. In the present case the landlord alleged the premises to be out of repair, and sent in his surveyor, who certified that the interior required repairs to the amount of £45. The Plaintiff's surveyor does not deny the accuracy of any one of the items of dilapidation set forth by the Defendant's surveyor, but estimates the cost of repairing them at £20; and another witness for the Plaintiff states his readiness to repair them for £13 10s. It is clear, then, that at the time of applying for the lease there was an existing breach of the covenant to repair for which an action would lie. In a case like this, if a tenant wishes to claim the benefit of such a covenant he should send in his surveyor to see what repairs are needed, and should effect the repairs which the surveyor certifies to be requisite. The Court would be inclined to give credit to a survey thus honestly made, and would lean towards holding the condition precedent to have been complied with. But in the present case it is admitted that there was an existing breach of the covenant to repair.

Then as regards the persons to whom the lease was to be granted. The proviso for forfeiture on alienation without license strengthens the conclusion drawn from the terms of the covenant itself, that the lease was to be granted only to both the tenants. Whether, if one died, the survivor would be entitled to claim the benefit of the covenant, is a question on which I have not made up my mind; nor is it necessary to do so, for both tenants are living, and one of them has committed a forfeiture by assigning to the other. This forfeiture, no doubt, has been waived, but I do not see that this waiver can alter the terms of the covenant for renewal. Very often a landlord has no intention of waiving a breach of covenant, but having received rent after notice of it, is precluded from taking advantage of the forfeiture, because it is a contradiction in terms to treat a man as a tenant, and then treat him as a trespasser. But under the covenant to renew, the tenant can only ask for such a lease as the landlord covenanted to grant, namely, a lease to both tenants.

C. A.

1876

FINCH v. UNDERWOOD.

Judgment, Baggallay, J.A.

BAGGALLAY, J.A.:—

I am of the same opinion. There are three questions in the case: First, was the Plaintiff, on the 24th of May, 1875, in a position to give a notice requiring a renewal of the lease? To entitle him to give such notice it was necessary that the condition precedent that the covenants of the original lease should be performed should have been complied with, and for the reasons already given I am of opinion that the condition was not performed. Secondly, was the notice in accordance with the terms of the original lease? By the terms of the covenant the notice might be given by the tenants, or either of them, but the lease was to be granted to the two. The notice was given by one, and required the lease to be granted to that one. It was said that this might be looked upon as an application for a proper lease, and that the other lessee would concur in accepting it. There is no evidence that he is willing to do so, nor do I think this the proper construction of the notice. Thirdly, was the landlord bound to grant a lease in accordance with the notice? I am of opinion that he was not. He could not be bound to grant a lease to one, nor to both after one had become bankrupt. It is said that the Plaintiff has spent a good deal of money on the property, and that the case is one of great hardship; but this argument comes with a bad grace from a tenant the payment of whose rent the landlord was so often obliged to enforce by distress.

Solicitors: *Palmer, Bull, & Fry; H. W. Cattlin.*

C. A.
1876
March 20.

BURTON *v.* STURGEON.

[1874 B. 272.]

Marriage Settlement—Dissolution of Marriage—Interest of Husband.

22 L.D. 620

By a marriage settlement the wife's property was settled upon trust for her for life, and after her decease, as to one moiety, in trust as she should appoint, and, in default of appointment, as to real estate for her heirs, and as to personalty for her next of kin; and as to the other moiety, in trust for the husband absolutely. The wife obtained an absolute decree for dissolution of the marriage, and afterwards filed a bill to have the settled property transferred to her:—

Held (affirming the decision of the Master of the Rolls), that the husband's rights under the settlement were not forfeited by the dissolution of the marriage, and that the bill must be dismissed.

Statement.

THIS was an appeal by the Plaintiff from a decree of the Master of the Rolls dismissing the bill.

On the 26th of March, 1864, a marriage was solemnized between *Caroline Seymour Burton*, a widow, and the Defendant *Sturgeon*. Mrs. *Burton* at the time of the marriage was absolutely entitled to considerable property, freehold, leasehold, copyhold, and personal. By a settlement dated the 2nd of June, 1864, made in pursuance of ante-nuptial articles, and by several deeds of transfer, the freehold, leasehold, and personal estates were vested in *Hodgson* as trustee absolutely, and a covenant was entered into for a surrender of the copyholds to him in fee. The trusts declared were for the separate use of the wife for life, and after her decease, as to one moiety of the freeholds, leaseholds, copyholds, and moneys, and as to the entirety of certain plate, jewellery, and other articles, upon trust as she should by deed or will appoint, and, in default of appointment, as to the freeholds in trust for her heirs, as to the copyholds in trust for her customary heirs, and as to the personal estate in trust for such persons as would be entitled thereto under the Statutes of Distribution if she had died unmarried and intestate; and as to the remaining moiety of the property, except the plate, jewellery, &c., in trust for the husband, his heirs, executors, administrators, and assigns.

On the 31st of May, 1870, Mrs. *Burton* presented her petition

to the Court of Divorce for a dissolution of the marriage. On the 15th of December, 1870, she obtained a decree *nisi*, which, on the 27th of June, 1871, was made absolute. There never was any issue of the marriage.

Statement.

On the 2nd of September, 1874, Mrs. *Burton* filed her bill against *Sturgeon*, his mortgagees, and *Hodgson*, the trustee, praying a declaration that she was absolutely entitled to the settled property, and that it might be conveyed and assigned to her.

Mrs. *Burton* died on the 5th of October, 1875, leaving a will under which the Defendant *Hodgson* was executor and sole devisee and legatee. On the 5th of November, 1875, *Hodgson* revived the suit, and the cause came before the Master of the Rolls on motion for decree on the 13th of January, 1876, when His Lordship dismissed the bill with costs without argument, the same point having been fully considered and decided by him on the 9th of November, 1875, in *Fitzgerald* v. *Chapman* (1). Mr. *Hodgson* appealed.

Argument.

Chitty, Q.C., and *Locock Webb*, Q.C., for the Appellant:—

This bill was filed on the authority of *Fussell* v. *Dowding* (2), which followed the principle of *Swift* v. *Wenman* (3), *Wilkinson* v. *Gibson* (4), *Wells* v. *Malbon* (5), and *Jessop* v. *Blake* (6). We submit that those decisions were justified on the ground that a marriage settlement contains an implied condition that the marriage shall continue till it is dissolved by the death of one of the parties. The benefits given to the husband are given to him in his character of husband, and he ought not to take them if through his own default he ceases to fill it: *Kennell* v. *Abbott* (7); though we admit that we cannot ask the Court to hold the settlement void: *Evans* v. *Carrington* (8). The bill, at all events, ought not to have been dismissed with costs, looking to the state of the authorities when it was filed.

[Statutes 20 & 21 Vict. c. 85, s. 45, and 22 & 23 Vict. c. 61, s. 5, were referred to during the argument.]

(1) 1 Ch. D. 563.
(2) Law Rep. 14 Eq. 421.
(3) Ibid. 10 Eq. 15.
(4) Ibid. 4 Eq. 162.
(5) 31 Beav. 48.
(6) 3 Giff. 639.
(7) 4 Ves. 802.
(8) 2 D. F. & J. 481.

S. Jur. N.S. 250
S. Jur. N.S. 587
7 Jur. N.S. 197

C. A. 1876 BURTON v. STURGEON.

Cookson, Q.C., and *Everitt*, for the Respondent, were not called upon.

Judgment, James, L.J.

JAMES, L.J. :—

This case is too plain for any doubt. On the marriage of the Plaintiff a settlement was made by which certain provisions were made for the parties. It is argued that a dissolution of the marriage is to have the same effect as if the marriage had never taken place. If so, it makes no difference which is the guilty party. If it be said that it should be held to have that effect as regards the interests of the guilty party, the answer is that we have no jurisdiction to punish guilt in that way. The appeal must be dismissed with costs.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors: *Harrison, Beal, & Harrison ; C. H. Hodgson.*

C. A. 1876 March 23.

In re MEW. *Ex parte* PEARCE.

Liquidation—Costs of Debtor's Solicitor—Petition filed by one of two Partners—The other Partner an Infant—Joint Estate administered by Consent—Bankruptcy Rules, 1870, *rr.* 31, 113, 291.

18 Ch D. 211

Of two partners one was an infant. The adult partner filed a liquidation petition. He had no separate estate. By consent the joint estate was administered by the trustee appointed under the petition :—

Held, that the costs of the debtor's solicitor up to the date of the appointment of the trustee ought to be paid out of the joint estate.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

G. W. K. Mew and *J. G. P. Brotheridge* carried on business as wine merchants in partnership. *Brotheridge* was under the age of twenty-one. On the 23rd of September, 1875, *Mew* filed a liquidation petition. At this time the sheriff had seized and was about to sell the stock-in-trade and effects of the firm, under a writ of *fi. fa.* issued against the firm for a debt of more than £100. After the

C. A. 1876 *In re* MEW. *Ex parte* PEARCE.

Statement.

filing of the petition a receiver was appointed, and an injunction was granted by the Court to restrain further proceedings under the execution. The creditors resolved on a liquidation by arrangement, and on the 2nd of December they appointed *G. A. Pearce* trustee. On the 17th of January, 1876, upon the application of the trustee, and upon the consent of the solicitor of *Brotheridge* on his behalf, it was ordered that the accounts of the partnership firm should be taken, and the whole of the assets of the firm should be got in, with power to sell or otherwise to realize the assets, as occasion should require, and that an account should be taken of the joint debts of the partners, and that, when the assets had been got in and realized, the same should be applied in payment in the first instance of the costs and expenses of *Pearce* as trustee, and of the administration of the estate, and then in payment of the debts due by the partners *pari passu*, with liberty, in case of any surplus after payment of such debts, for either of the parties to apply to the Court for directions as to the surplus. And it was further ordered by consent that *Pearce* should be appointed receiver of the joint estate of *Brotheridge* and *Mew*, and *Brotheridge* consenting, *Pearce*, as trustee, was authorized to use the name of *Brotheridge* in commencing and prosecuting any action or suit in the names of *Pearce* and *Brotheridge*. All the joint assets of the partnership were taken possession of by *Pearce* and were realized by him. The execution was withdrawn.

W. A. Downing, the solicitor who had acted for *Mew* in the filing and preparation of the petition, and who had continued to act in the matter of the petition until the appointment of the trustee, claimed to be paid out of the assets received by the trustee the sum of £50 8*s.* 10*d.*, the amount of his taxed costs in the matter. *Mew* had no separate estate. The Registrar ordered the payment to be made accordingly.

The trustee appealed.

Argument.

J. Henderson, for the Appellant:—

The costs of the solicitor up to the appointment of the trustee are not costs of the trustee. The order in effect makes the joint creditors pay for the separate proceedings.

[MELLISH, L.J.:—Could the infant be made a bankrupt? If

C. A. 1876

In re MEW. *Ex parte* PEARCE.

these costs are not to be paid, the joint creditors will get the benefit of the proceedings without paying for them.]

Argument.

The Chief Judge held, in *Ex parte Lynch* (1), that an infant trader can be adjudicated a bankrupt.

Rule 113 does not apply.

[JAMES, L.J. :—It is the honest thing to pay these costs. The result of the proceedings has been that the trustee has got in the joint estate.]

There is no bankruptcy of the joint estate.

[MELLISH, L.J., referred to rule 291, and said that this was practically the administration of the joint estate.]

At any rate the trustee's own costs should have priority over those of the solicitor.

[JAMES, L.J. :—The solicitor's costs come before those of the trustee, except his costs of realizing the estate.]

Ince, Q.C., and *Bagley*, for the solicitor, were not called upon.

Judgment, James, L.J.

JAMES, L.J. :—

I think it is a proper case for the payment of these costs out of the estate. The appeal will be dismissed.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitor for Appellant: *J. Pettengill.*
Solicitor for Respondent: *W. A. Downing.*

(1) *Ante*, p. 127.

In re PAGE. *Ex parte* PAGE.

C. A.
1876
March 23.

Composition—Power of Majority to bind Minority—Bona fides—Fraud—Motives of Kindness to Debtor—Small amount of Composition compared with Assets—Registration of Resolutions—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 126—*Bankruptcy Rules*, 1870, *r.* 295.

The statement of a debtor who had filed a liquidation petition shewed that his debts amounted to £1257, and that his assets were worth £371. The creditors resolved to accept a composition of 1*s.* in the pound, to be paid in twelve months. One creditor opposed the registration of the resolution :—

Held, that, having regard to the amount of the assets, the resolution could not have been passed *bonâ fide*, and that registration of it had been rightly refused.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

J. O. Page, a butcher at *Dockhead, Surrey*, filed a liquidation petition on the 11th of January, 1876. The first meeting of creditors was held on the 27th of January. By the debtor's statement of his affairs produced at the meeting, it appeared that his debts amounted to £1257, and that he estimated his assets to be worth £371. The assets consisted of £5 cash, and of stock-in-trade, book debts, furniture, and surplus value of property held by secured creditors; and the debts included a sum of £126, which was stated to be due to preferential creditors who were entitled to be paid in full. The debtor offered to pay a composition of 1*s.* in the pound, in twelve months from the registration of the resolutions. No security was to be given for its payment. The statutory majority of the creditors present resolved to accept the offer, and the resolutions were duly confirmed at the second meeting, held on the 8th of February. The registration of the resolutions was opposed by *Isaac Beer*, a creditor for £50 12*s.* Mr. Registrar *Keene* refused to register them, and his decision was affirmed by Mr. Registrar *Hazlitt*, acting as Chief Judge.

The debtor appealed.

Argument.

Robertson Griffiths, for the Appellant :—

The only reliable asset appearing in the statement is the £5

C. A. 1876 *In re* PAGE. *Ex parte* PAGE. Argument.

cash. Even if the amount of assets is the proper test of the validity of the composition, which I say it is not, 1*s.* in the pound would be a reasonable composition. The creditors are the best judges of their own interests: *Ex parte Linsley* (1). Here only one small creditor opposes. *Ex parte Cowen* (2) may be cited against me, but that was really a case of fraud, and moreover it was a decision under the *Bankruptcy Act*, 1861. There must be fraud to disentitle the debtor to registration of the resolutions, and here the creditors knew all the facts.

Brough, for the opposing creditor, was not called on.

Judgment, James, L.J.

JAMES, L.J.:—

Two Registrars in succession have come to the conclusion that these resolutions were not such that the majority of the creditors could reasonably and properly bind the minority by them. I agree in this conclusion. The Legislature has given great power to the majority, but it must be exercised *bonâ fide* in the interest of the creditors, and not from motives of kindness to the debtor. There must be a *bonâ fide* resolution of the creditors dealing as creditors. Here both the Registrars thought that the composition of 1*s.* in the pound was, having regard to the amount of the assets as shewn by the debtor's own statement, a mere sham. I think so too. The appeal will be dismissed with costs.

MELLISH, L.J.:—

I am of the same opinion.

BAGGALLAY, J.A.:—

I agree.

Solicitor for Appellant: *Nind.*
Solicitor for Respondent: *G. H. Finch.*

(1) Law Rep. 9 Ch. 290. (2) Law Rep. 2 Ch. 563.

GRILLS *v.* DILLON.

C. A.
1876
March 24.

[1874 G. 137.]

Practice—Motion for Security for Costs of Appeal—Rules of Court, 1875, *Order* LVIII., *r.* 15.

Notice of motion by a Respondent that the Appellant may be directed to give security for the costs of an appeal may be served without leave.

IN this case the Plaintiff appealed from a decree of Vice-Chancellor *Hall*, and the appeal was set down on the 20th of March, 1876. The Defendant desired to obtain security for costs, and now applied for leave to serve notice of motion for that purpose.

Mr. *Colt*, for the application, stated that, according to the practice as understood in the offices, it was necessary to obtain leave to serve the notice of motion, and that the motion would not otherwise be set down. He referred to Rules of Court, 1875, Order LVIII., rule 15.

THE COURT (*James*, L.J., *Mellish*, L.J., and *Baggallay*, J.A.) held that leave to give notice of motion was not necessary, and desired that this might be understood in the offices.

Solicitors: *Pattison, Wigg, & Co.*

C. A.

1876

March 16, 30; April 6.

In re WEBB. *Ex parte* WALTER.

Liquidation by Arrangement—Passing of Special Resolution—Sufficiency of Debtor's Statement of Affairs—Registration—Powers of Registrar—Appeal by Creditors not heard before Registrar—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 125—*Bankruptcy Rules*, 1870, *rr.* 295, 301.

3 Ch. D. 216
LR 7 Ch 168
5 C.L.D. 346
7 Ch D. 713.
714-5-6-7
-719.
13 C.L.D. 302
14 Ch D 465-4
16 Ch D 634
20 C.L.D 285

The meaning of rule 301 of the Bankruptcy Rules, 1870, is, that, on the presentation of a special resolution for liquidation by arrangement to the Registrar for registration, the passing of the resolution is conclusive evidence that the debtor's statement of affairs is sufficient, and the Registrar has no power to inquire into the sufficiency of the statement.

If, however, it is clear *ex facie* that the statement produced by the debtor is one which the majority of the creditors could not have accepted *bonâ fide* in the interest of the creditors, this may be taken as an objection to the registration of the resolution, but it cannot be raised after registration.

If the statement is a fraudulent one, the proper course for a dissentient creditor to take is to move, after the resolution has been registered, to have the registration vacated.

Creditors who have not been heard before the Registrar on an application for the registration of resolutions, or before the Chief Judge on an application to reverse the order for registration, have a *locus standi* to appeal from the order of the Chief Judge.

The Registrar may register resolutions for liquidation, omitting from them, with the debtor's consent, a resolution for an immediate discharge.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

On the 16th of January, 1875, *T. S. Webb*, a colliery proprietor, filed a liquidation petition. The first meeting of the creditors was held on the 3rd of February, and certain resolutions were passed. The registration of them was, however, refused, on the ground that the debtor's statement did not distinguish between his joint and separate assets and debts (he having formerly been in partnership), and leave was given to summon a fresh first meeting of the creditors: see *Ex parte Gibbs* (1). The fresh first meeting was held on the 10th of May, 1875. The debtor's statement of his affairs then produced shewed that his unsecured debts amounted to £34,844, and that he estimated his assets to be worth £10,552. In the statement of assets there was this entry: "Amount due from the *Consolidated Collieries Company*, £100,000, estimated to realize *nil*." The debtor was not examined about

(1) Law Rep. 10 Ch. 382.

this debt at the meeting. The following resolutions were passed by the statutory majority of the creditors present:—

Statement.

(1.) That the affairs of the debtor should be liquidated by arrangement and not in bankruptcy.

(2.) That *H. J. Walter* should be appointed trustee.

(3.) That *James Carter* and three other persons should be appointed a committee of inspection.

(4.) That the discharge of the debtor should be granted.

(5.) That Messrs. *Morley* and *Shirreff* should be intrusted with the registration of this special resolution.

Some of the dissentient, creditors objected to the registration of these resolutions, on the ground that the debtor's statement of affairs was irregular in form, untrue and insufficient, and that it did not disclose particulars of the whole of his assets and liabilities. The main ground of objection really was, that the debt of £100,000 was due, not to *Webb* alone, but to a syndicate partnership of which *Webb*, *Carter*, and two other persons were members, and also that it had been greatly and intentionally undervalued, and a great deal of evidence was adduced before Mr. Registrar *Keene* to shew that it was likely to produce a large sum, and that it might even be paid in full.

The Registrar decided that the resolutions must be registered, except the fourth, which granted the debtor his discharge. He declined to register that, and after he had expressed his opinion the debtor's solicitor said he consented to withdraw it.

The opposing creditors appealed, and Mr. Registrar *Pepys*, acting as Chief Judge, ordered the registration to be cancelled. The trustee and some of the creditors appealed. The debtor did not appeal, and the creditors who appealed had not been heard before Mr. Registrar *Pepys*.

Argument.

Benjamin, Q.C., *Winslow*, Q.C., and *W. M. Goodman*, for the Appellants.

Hemming, Q.C., and *Leeson*, for the Respondents, dissentient creditors who had appeared before the Registrar to oppose the registration of the resolutions:—

The Appellants have no right to appeal. The order was made

C. A. 1876

In re WEBB. *Ex parte* WALTER.

Argument.

upon hearing only us and the debtor. No person not then represented is entitled to appeal: Bankruptcy Rules, 1870, r. 295. The debtor has not appealed.

[MELLISH, L.J.:—All the creditors are interested in the question. Why may not the majority appeal?

JAMES, L.J.:—They allowed the debtor to fight the question then, but he was unsuccessful.]

If the order is wrong, it is because the Appellants were not then summoned. A person who was not summoned cannot appeal. His proper course is to apply to discharge the order for irregularity.

Winslow, Q.C.:—By sect. 71 any person aggrieved by an order may appeal from it.

THE COURT (*James*, L.J., *Mellish*, L.J., and *Baggallay*, J.A.) overruled the objection.

Winslow, Q.C., stated the nature of the objections which were raised to the registration of the resolutions.

THE COURT then said that the most convenient course would be for the Respondents' counsel to open the facts, and to argue their case first.

Hemming, Q.C., and *Leeson*, for the Respondents, then read the evidence which was taken before the Registrar:—

The evidence shews that the *Consolidated Colliery Company* has some assets, and that if the assets are properly realized the debt of £100,000 is likely to produce a considerable sum for *Webb's* creditors. Our motive in pressing the objection is that we do not trust the committee of inspection who have been appointed. *Carter*, who is one of the committee, was the promoter, and is a director, of the company, and we desire to have an administration of the estate which is not tainted by the influence of the principal debtor to it. If the creditors had known all the facts which are now disclosed they might have come to a different conclusion; at any rate they would not have appointed *Carter* one of the committee of inspection. Sect. 125 of the *Bankruptcy Act*, 1869, requires

that the debtor shall produce a full statement of his affairs (1). The Registrar is entitled to inquire whether that statement is one which complies with the requirements of the Act and the Rules: Rule 295; *Ex parte Cockayne* (2). In that case it was held by the Chief Judge that where a debtor's statement did not distinguish between his joint and separate assets and debts, the resolution which the creditors had passed for a liquidation by arrangement could not be registered, even though there were no dissentient creditors, and that decision was approved by this Court in *Ex parte Gibbs* (3). Here it is proved that the debt of £100,000 was due, not to *Webb* alone, but to a syndicate of which *Webb, Carter,* and two other persons were members. This misstatement is much more serious than the accidental omission to mention the interests of partners, for which the first set of resolutions was properly refused registration: *Ex parte Gibbs.* Moreover, the Registrar has no power to reject one resolution unless he rejects all, except

(1) Section 125, sub-sect. 3: "The debtor, unless prevented by sickness or other cause satisfactory to such meeting, shall be present at the meeting at which the special resolution is passed, and shall answer any inquiries made of him, and he, or if he is so prevented from being at such meeting, some one on his behalf, shall produce to the meeting a statement shewing the whole of his assets and debts, and the names and addresses of the creditors to whom his debts are due."

Sub-sect. 3: "The special resolution, together with the statement of the assets and debts of the debtor, and the name of the trustee appointed, and of the members, if any, of the committee of inspection, shall be presented to the Registrar, and it shall be his duty to inquire whether such resolution has been passed in manner directed by this section, but if satisfied that it was so passed, and that a trustee has been appointed with or without a committee of inspection, he shall forthwith register the resolution and the statement of the assets and debts of the debtor, and such resolution and statement shall be open for inspection on the prescribed conditions, and the liquidation by arrangement shall be deemed to have commenced as from the date of the appointment of the trustee."

Rule 295 provides: "Upon presentation of a special or extraordinary resolution for registration the Registrar shall examine the same, and may hear any creditor who shall have given him notice of his desire to be heard thereon. The Registrar, being satisfied that the requirements of the statute and of these rules have been complied with, shall register the same. . . . The registration of any special or extraordinary resolution, or the refusal to register the same by the Registrar, shall be an act that may be appealed from by the debtor or any creditor who was heard before the Registrar on the occasion of such registration or refusal."

(2) Law Rep. 16 Eq. 218.

(3) Ibid. 10 Ch. 382.

C. A. 1876 — *In re* WEBB. *Ex parte* WALTER. — Argument.

in a case where a resolution was *ultrà vires*: *Ex parte Ashworth* (1); *Ex parte Browning* (2).

Benjamin, Q.C., *Winslow*, Q.C., and *W. M. Goodman*, for the Appellants:—

The question is whether, because the debtor may have made some error in his statement, the minority of the creditors have therefore a right to say to the majority, there shall be a bankruptcy, not a liquidation. A resolution for liquidation has to be passed at only one meeting: confirmation by a second meeting is not required, as in the case of composition. And by rule 301 (3) the passing of the special resolution is made conclusive as to the sufficiency of the debtor's statement of affairs.

In a case of composition the resolutions have no effect until they are registered; sect. 126 expressly says so. By rule 306 power is given to the debtor to summon a meeting of the creditors for the purpose of correcting any mistake inadvertently made in his statement. But here the creditors could not be injured by his putting too low a value on his assets; the creditors will get them all, whatever their value. The time for the creditors to examine the debtor is at the meeting: *Ex parte Levy & Co.* (4); *Ex parte Jones* (5); *Ex parte Mackenzie* (6). A creditor who did not choose to examine the debtor then cannot raise an objection when it is too late for the debtor to amend his statement. The intention of the Act was that the creditors at the meeting should themselves be the judges of such matters as this. Here the statement was one which was calculated to put the creditors on inquiry. There was certainly

(1) Law Rep. 18 Eq. 705.

(2) Ibid. 9 Ch. 583.

(3) Rule 300: "Neither the resolutions nor the proofs or proxies of creditors assembled at any meeting shall be objected to or refused by the Registrar by reason of any informality therein, unless he shall be of opinion that such informality is matter of moment, in which event he shall refer the matter to the Judge."

Rule 301: "The passing of a special resolution (in the case of liquidation by arrangement) shall be deemed and taken as conclusive evidence that the debtor has complied with the provisions of the statute with regard to the statement of his affairs required to be submitted to the general meetings of his creditors. The debtor shall, however, at all times render to the trustee every information in his power with reference to his debts and assets, and shall in default be liable to be summoned and examined before the Court thereon."

(4) Law Rep. 11 Eq. 619.

(5) Ibid. 16 Eq. 386.

(6) Ibid. 10 Ch. 88.

C. A. 1876 *In re* WEBB. *Ex parte* WALTER.

nothing to induce them to grant the debtor an immediate discharge in the fact that he had set down a large nominal asset as worthless. On the evidence we contend that there is nothing to shew that the statement was made otherwise than *bonâ fide*, or indeed that it is in fact untrue.

Argument.

As to the registration of some only of the resolutions, we contend that the Registrar had power to reject one or more. They are, in fact, separate resolutions; the appointment of the trustee and the discharge of the debtor are not necessary parts of the special resolution; those matters might have been dealt with afterwards. At any rate, the dissentient creditors have no reason to complain that the debtor has not got his discharge; the result of that is that his future assets are left available to pay their debts.

Hemming, in reply:—

If the construction which it is sought to put on rule 301 is right, the practice of the Bankruptcy Court has been wrong from the first; *Ex parte Cockayne* (1), approved in *Ex parte Gibbs* (2), must be wrong, and the provisions of the Rules will be made absurd; there will be no necessity for any bankrupt desiring an arrangement to make a statement in accordance with the statute. Indeed, the suggested construction is inconsistent with rule 295, and with the decision in *Ex parte Cockayne*. *Ex parte Levy & Co.* (3) only shews that the Registrar cannot examine the debtor on oath, but that has never since been acted on. If it had, it would not go the length of what is now contended for. Examination of the debtor at the meeting at which the statement is produced would be a farce without the opportunity of first finding out the facts on which it was open to cross-examination; and at a meeting filled with the debtor's friends it would be impossible to get an adjournment for the purpose.

A. T. Watson, for the debtor.

April 6. JAMES, L.J.:—

Judgment, James, L.J.

This is an appeal from a decision of Mr. Registrar *Pepys*, acting

(1) Law Rep. 16 Eq. 218. (2) Law Rep. 10 Ch. 382.
(3) Law Rep. 11 Eq. 619.

C. A. 1876 *In re* WEBB. *Ex parte* WALTER. Judgment, James, L.J.

as Chief Judge in Bankruptcy, whereby he discharged an order previously made by Mr. Registrar *Keene*, which had directed the registration of resolutions passed by the creditors of Mr. *T. S. Webb* for the liquidation of his affairs by arrangement, and not in bankruptcy, and the appointment of a trustee and a committee of inspection. A great mass of evidence was taken before Mr. Registrar *Keene*, and after considering it he came to the conclusion that he ought to register the resolutions. Mr. Registrar *Pepys* was of opinion that they ought not to be registered, upon the ground that the statement of the debtor, produced at the meeting of his creditors, was in substance so inaccurate as to be delusive, and to that extent fraudulent. The most important contention raised before us on the part of the Appellants was, that the whole of the proceedings taken before Mr. Registrar *Keene* were taken in truth *coram non judice*. Until I heard the argument in this case, I was not aware of the very strong and stringent language in which the 301st rule is expressed, but having now considered it in connection with the rules which are immediately before and after it, and sect. 125 of the Act, I am unable to find any answer to the contention of the Appellants. It appears to me that this 301st rule was intended to have the effect of excluding, upon an application for the registration of resolutions, the raising of any such question as that which was raised before Mr. Registrar *Keene* in the present case. No doubt in *Ex parte Cockayne* (1) the Chief Judge held, and this Court, in *Ex parte Gibbs* (2), approved of his decision, that when a debtor has not in his statement distinguished between his joint and separate debts and assets, the resolutions of his creditors, which are founded on that statement, are void and cannot be registered. But, to my mind, such a case as that is totally different from the one now before us. If *ex facie*, and so that *res ipsa loquitur*, the statement produced by the debtor was plainly no statement at all, as if, for instance, he produced a blank sheet of paper, or if he said, debts to such an amount are owing by me and some one else, and assets of such an amount belong to me and to some one else, it would be quite clear that there was no statement within the meaning of the Act, and no meeting of creditors could honestly or properly accept it as such. But it

(1) Law Rep. 16 Eq. 218. (2) Law Rep. 10 Ch. 382.

would be quite a different thing to say, in the face of this rule, that there can be an inquiry before the Registrar as to any particular item in the statement, and that the debtor, his friends, his partners, and his solicitor can be summoned and examined about it. This would be, in effect, to allow a trial to take place of the correctness of the debtor's statement, which, as it seems to me, this rule was expressly intended to exclude, and what has taken place in the present case proves, to my mind, the necessity and propriety of such a rule. Whether, in these cases, there should be a bankruptcy or a liquidation by arrangement is a matter which ought to be determined at once, and should not be hung up for months. This would be enough to dispose of the present appeal, but, as the matter has been fully gone into before us, I feel bound to say that, in my opinion, no case has been made out against the debtor of any intentional misstatement. I think that the appeal must be allowed; the order of Mr. Registrar *Pepys* must be discharged, and that of Mr. Registrar *Keene* restored.

MELLISH, L.J.:— Mellish, L.J.

I am of the same opinion. When the 301st rule was first cited to us by Mr. *Benjamin* I doubted whether it meant that the passing of the special resolution should be conclusive evidence that all the provisions of the statute with regard to the debtor's statement of his affairs had been complied with before the Registrar on the application to register the resolutions, or whether it only meant that it should be conclusive evidence after the registration had been made, so that the matter could not then be re-opened by any dissentient or absent creditor. But, having regard to the provisions of rule 300, as well as to those of sect. 125, sub-sect. 4, and sect. 127, I think it is clear that the passing of the resolution was intended to be conclusive before the Registrar on the question whether he should register it or not. This, as it seems to me, follows from the fact that sect. 127 had already, in the clearest terms, enacted that the registration of the special resolution should, in the absence of fraud, be conclusive evidence that the resolution had been duly passed, and that all the requirements of the Act in respect of it had been complied with, and therefore it would have been wholly unnecessary to make such a rule as rule

C. A. 1876 *In re* WEBB. *Ex parte* WALTER. Judgment, Mellish, L.J.

301 if the only object had been to make the passing of the resolution conclusive evidence of the sufficiency of the debtor's statement after the resolution had been registered. Rule 300 manifestly relates to something which the Registrar is to do upon an application being made to him for the registration of resolutions, and rule 301, which immediately follows it, cannot possibly, I think, mean anything else but that the passing of the resolution is to be conclusive upon the Registrar on the application to register. The question then arises, what is the effect and extent of this rule? It clearly cannot be carried so far as to extend to a case in which the debtor has made no statement at all. But I think the meaning is, that any examination into the correctness of the debtor's statement is to be made at the meeting of the creditors, and nowhere else. The creditors have an opportunity of examining the debtor about it at the meeting, and they can, if necessary, adjourn the meeting for the purpose; but the majority of the creditors, if they are acting *bonâ fide* for the benefit of all the creditors, are the persons who are to determine whether the debtor's statement of affairs is correct or not. The rule was intended to prevent the very thing which has happened in this case: it was intended that a creditor who had not examined the debtor at the meeting should not be able to go into the whole matter afterwards. What, then, is to be done if the debtor has made a fraudulent statement? I am of opinion that if the creditors have been induced by means of a fraudulent statement to accept a liquidation by arrangement instead of a bankruptcy, the passing of the resolution is not under such circumstances conclusive upon them. But still I think the question of fraud ought not to be entered into upon the application to register the resolutions, but a creditor who desires to raise the objection ought to make a distinct application to have the resolutions rescinded and the registration vacated. If, however, the majority of the creditors have in passing the resolutions acted unfairly in the interest of the debtor, I think that is an objection which it is open to a dissentient creditor to take on the application to register, but not afterwards. So, also, if a dissentient creditor has not been allowed a proper opportunity of examining the debtor at the meeting, that objection ought to be taken on the application for

registration. But, if the majority of the creditors are acting *bonâ fide* for that which they consider to be the interest of the creditors at large, then I think that rule 301 makes the passing of the resolution conclusive as regards the correctness of the debtor's statement of affairs. I also concur with the Lord Justice in thinking that, even if the whole matter had been now open, there is no evidence to prove that the debtor has made any fraudulent statement, or that he did not *bonâ fide* believe that this debt of £100,000 was practically worth nothing.

BAGGALLAY, J.A.:—

I concur in thinking that this appeal ought to be allowed. When an application is made for the registration of a special resolution passed by creditors for the liquidation of their debtor's affairs by arrangement, the duties of the Registrar are limited to those which are pointed out by the 4th sub-section of sect. 125 of the Act. If he is satisfied that the resolution was duly passed, then he is to register it. All that he has to do is to ascertain whether the meeting was properly convened, and whether the resolution was passed by the proper statutory majority. No doubt, in order to do this, he must see whether the debtor has produced to the meeting a statement of his affairs containing the whole of his debts and assets; and, if it clearly appeared that he had made no such statement, it would be the duty of the Registrar not to register the resolution. But it was never intended that there should be cast upon the Registrar the duty of ascertaining whether the statement of the debtor, when he has made one, is such as to justify the resolution which has been passed; that is a duty which is imposed by the Act on the creditors themselves. Rule 295 has also a material bearing on this question, for it provides that on the presentation of the resolution for registration, any creditor may be heard upon any matter which is within the jurisdiction of the Registrar, as, for instance, on the question whether the resolution was one which it was within the power of the creditors to pass. Strictly speaking, the resolution is limited by the Act to a declaration that the affairs of the debtor shall be liquidated by arrangement, though, no doubt, for convenience, other matters, such as

C. A. 1876 *In re* WEBB. *Ex parte* WALTER.

the appointment of a trustee and of a committee of inspection are generally comprised in it. But, if something not within the power of the creditors was imported into the resolution, then it would be the duty of the Registrar not to register it. I entirely concur in the view already expressed by my learned Brothers as to the effect of the evidence in this case.

JAMES, L.J.:—

With regard to the point taken in the argument, that the Registrar had no power to reject one of the resolutions and register the others, I am satisfied that there is no technical difficulty in the way of his doing that. The resolutions were really separate resolutions, and, in fact, no objection was taken by either party to what the Registrar did.

Hemming, Q.C., asked that the costs of the Respondents might be paid out of the estate of the debtor. Till the judgment of the Court had been pronounced to-day, a misapprehension had existed as to the jurisdiction of the Registrar in these matters, and this had led to all the costs which had been incurred.

JAMES, L.J.:—The Respondents have failed on the merits as well as on the question of jurisdiction, and they must pay the costs throughout.

Solicitors for Appellants: *Morley & Shirreff.*
Solicitors for Respondents: *R. Miller & Wiggins.*

In re GENERAL SOUTH AMERICAN COMPANY.

C. A.
1876
V.-C. M.
March 11.
C. A.
March 22.

Company—Debentures—Shareholders' Priority—Imperfect Register—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 43.

Where by the articles of association a limited company has power to mortgage all the property of the company, shareholders holding debentures purporting to charge all the property of the company have priority over the general creditors of the company, and their priority is not affected by imperfection in the register of debentures kept by the company.

Order of *Malins*, V.C., affirmed.

BY the articles of association of the *General South American Company, Limited*, the company had power "to make, endorse, and accept any bills of exchange or promissory notes for the purposes of the company, and to raise and borrow money in the course of the business of the company, or by debentures, or otherwise, and for that purpose to mortgage, pledge and charge all or any of the property of the company, and to give to the lenders powers of sale and other powers." The company carried on business with some success, but in 1874 was in difficulties, and at a meeting of the board of directors held on the 11th of November, 1874, it was resolved that a sum not exceeding £130,000 should be borrowed on debentures of the company, in sums of £100 each, bearing interest at 18 per cent. per annum. The sum of £72,000 was accordingly raised on debentures, all but £4000 being advanced by shareholders in the company. Each debenture was in the form of a bond under the seal of the company, purporting to mortgage and charge all the property, book debts, credits, assets, moneys, and other effects of or to which the company was then possessed or entitled, or should at any time thereafter become possessed or entitled, with payment of the sum of £100 and interest as therein mentioned. On this bond was indorsed a condition that "the holder for the time being of the within-mentioned debenture is to be entitled to the benefits of the mortgage and charge created by the within-written debenture upon the property, book debts, credits, assets, moneys, and other effects of the company rateably with the other holders of the said debentures issued and to be issued for the other portions of the said loan of £130,000,

C. A. 1876 *In re* GENERAL SOUTH AMERICAN Co.

Statement.

and without any preference or priority; and further, that notwithstanding the within-written debenture, and the security thereby created, the said company and the directors thereof shall be at liberty to continue to employ and use the present and future property, book debts, credits, assets, moneys, and other effects of the said company, or the proceeds thereof, or such parts thereof as they may from time to time consider necessary for the purpose of continuing and carrying on the business of the company, and meeting and paying the debts, liabilities, and engagements of the company, without any liability for so doing to the holders of the within-written debenture, or the other debentures issued or to be issued for any part of the said advance of £130,000, until default in payment of any principal or interest money within secured or intended so to be," or unless and until the company should be wound up.

The debentures were registered in a register kept by the company, wherein the dates of issuing the debentures respectively, the names and addresses of the holders, and the number and amount of each debenture were stated, but there was no mention of any property as charged or mortgaged.

On the 18th of November, 1875, an order was made for winding up the company, and the debenture-holders applied in the winding-up to be declared entitled to payment in priority to the general creditors of the company.

The application was heard on the 11th of March, 1876, by the Vice-Chancellor *Malins*.

Argument.

Cotton, Q.C., *Higgins*, Q.C., and *Everitt*, for the debenture-holders:—

This case is in principle identical with *In re Panama, New Zealand, and Australian Royal Mail Company* (1), and also with *In re Marine Mansions Company* (2). In all those cases words similar to the present were held to give priority to the holders over the general creditors of the company. The provision for continuing the business of the company cannot have the effect of annulling the charge created by the body of the instruments. The right to charge the future property of the company is clear: *Bloomer* v.

(1) Law Rep. 5 Ch. 318. (2) Law Rep. 4 Eq. 601.

Union Coal and Iron Company (1); and this extends to future calls when they are not made merely for the purpose of paying the costs of the winding-up: *Re Colonial and General Gas Company* (2).

Glasse, Q.C., and *Cookson*, Q.C., for the official liquidator:—

The questions in this case are, first, whether the company had power to charge its after-acquired property, and if so, what property can be so charged. If the holders of the bills and the other creditors of the company knew of the existence of the debentures, they knew that the company was authorized to contract the liability, because the debentures were expressed to be subject to the right of the company to carry on its trading, which necessarily involved dealing in bills and incurring debts, and that the debenture-holders had postponed payment of their debts in order to enable the company to carry on its business. If they did not know of the debentures, the register is clearly informal and insufficient to give them notice, because it does not state that any property of the company is charged. The debentures cannot charge the future property of the company. If they do, they must operate as a charge upon future calls, but this cannot be: *Bank of South Australia* v. *Abrahams* (3); *In re British Provident Life and Fire Assurance Society* (4); *In re Devon and Somerset Railway Company* (5). What these debentures really amount to is a charge on the undertaking as a going concern, and that does not include future property: *In re New Clydach Sheet and Bar Iron Company* (6). They cannot give any rights which would interfere with the carrying on of the business of the company: *Gardner* v. *London, Chatham, and Dover Railway Company* (7). It would be contrary to the policy of a trading company that they should appear to have property, and then that when the winding-up took place it should turn out that it was all absorbed by debentures or other charges.

(1) Law Rep. 16 Eq. 383.
(2) 23 L. T. (N.S.) 758.
(3) Law Rep. 6 P. C. 265.
(4) 4 D. J. & S. 407.
(5) Law Rep. 6 Eq. 610
(6) Ibid. 514.
(7) Law Rep. 2 Ch. 201.

10 Jur. NS 713.

C. A. 1876 — *In re* General South American Co. — Argument.

Kekewich, for certain of the general creditors:—

The contention of the debenture-holders is analogous to that set up in *Whitmore* v. *Mason* (1), where there was a provision in a partnership deed that in case of the bankruptcy of a partner his share should go over to the other partners, and this provision was held void as in fraud of the bankrupt laws. If these debentures bear the construction sought to be put upon them, they enable a company to take its property out of the reach of the creditors behind their backs.

Cotton, in reply:—

The decision in *Gardner* v. *London, Chatham, and Dover Railway Company* (2) was that the directors of the company had no power to make such a charge as was contended for. Here there is no question as to the authority of the directors. There is no real distinction between creditors before or after the issue of the debentures. The question is, in fact, decided by the limitation of liability by the *Companies Act*, and this prevents the application of any such principle as that of fraudulent preference on which *Whitmore* v. *Mason* turned, and which has no application to a limited company. In this case there was nothing but these outstanding assets which could be charged, the share capital having been paid up in full, and there was no reason why the necessary amount of money should not be raised by charging these assets. It was, therefore, quite unnecessary to specify in the register of mortgages what property was charged. But in any case the informality does not affect the validity of the charge. *In re Wynn Hall Coal Company* (3) was a case of debentures issued to directors, and the decision only went to shew that directors could not claim the benefit where they had neglected their duty, and on this ground *Ex parte Valpy & Chaplin* (4) was decided, and the case of an officer of the company was distinguished from that of an ordinary shareholder, and on the authority of that case it was held in *In re General Provident Assurance Company* (5) that the bankers

(1) 2 J. & H. 204.
(2) Law Rep. 2 Ch. 201.
(3) Law Rep. 10 Eq. 515.
(4) Ibid. 7 Ch. 289.
(5) Law Rep. 14 Eq. 507.

of a company were not its officers, so as to invalidate unregistered securities given to them by the company.

C. A.
1876
In re
GENERAL SOUTH AMERICAN CO.
Judgment, V.-C. M.

MALINS, V.C.—

This case involves a point of very great importance to the mercantile community dealing with joint stock companies, and I think it by no means free from difficulty. [His Honour then stated the facts of the case.]

Now it is a circumstance considerably against the debenture-holders that this money was not raised by any application to the public—there was no advertisement, no invitation to the public to subscribe—but that it was simply a subscription of additional capital by the shareholders of the company for the purpose of rescuing it from destruction; and I am bound to say, after all I have heard upon the subject, and ably as it has been argued, that my opinion remains very strong against the propriety of the transaction. I think it very improper that the shareholders who advanced money for the purpose of rescuing from destruction that in which they had embarked, should have the power of pledging every part of the property, giving themselves the priority, and thus excluding their creditors. If I were not bound by authority, I should certainly come to the conclusion that this transaction is so opposed to the strict rules of propriety as between the company and its creditors, that I should not give them the priority which they claim.

However, it must be borne in mind that the policy of the law is that no person dealing with a limited company is to look to anything but the limited assets. He is bound to know, and does know, that he cannot resort to a single member of the company for anything beyond the member's subscription for the amount of his shares, and that every member who has paid on his shares is free from all future liability. A person dealing with a company knows also its powers of borrowing, and that the company has power to pledge every part of the property of the company. A creditor would naturally say, "If I discount a bill or acceptance of this company, I am entitled to look to the company for payment, but I am not entitled to look to the assets of the company otherwise than in the condition in which the parties managing the

C. A. 1876 ~~ *In re* GENERAL SOUTH AMERICAN Co. Judgment, V.-C. M.

company have put them, and if by mortgaging, issuing debentures, or otherwise, they have taken all the property out of the reach of the general creditors—if I have notice of that fact—I have no right to complain." As an individual, I may say that creditors have great reason to complain, especially with regard to a company which carries on its trade abroad, as foreign creditors do not in fact know these things, and are ignorant of the conditions and provisions of our Limited Liability Acts. But still in this Court I must take them as knowing that they are dealing with a company of limited liability, and I must attribute to them possession of all the knowledge which they ought to possess.

[His Lordship then read out the form of debenture, and said that there were several decisions that a company could pledge all its property by way of mortgage. The first, perhaps, was *In re Marine Mansions Company* (1), before the Vice-Chancellor *Wood*. A similar decision was come to in *In re Panama, &c., Royal Mail Company*, first by His Lordship as Vice-Chancellor, and then by the Court of Appeal (2). His Lordship then commented on the form of the debenture as providing that the company might still retain their property and effects, and said that he did not think he could look upon that as amounting to anything more than the usual clause in a mortgage deed, that until default is made the mortgagor may remain in possession. There was further a provision that if the company stopped payment the creditors were to be at liberty to take possession of the property, and exercise all their powers. Now if the creditors had been told that every particle of the property of this company was pledged to secure £72,000, could they have complained? And were they not told all this by the fact of its being a limited company? Were they not bound to make all these inquiries? The very policy of the *Winding-up Act* was that all persons dealing with a company should have notice of the extent to which the company could create liabilities, and of everything connected with them, and therefore these creditors were precisely in the same situation as if they had been told so in so many words.]

These debentures are a first charge upon all the property, and the creditors must stand behind them. If they had made inquiry

(1) Law Rep. 4 Eq. 601. (2) Law Rep. 5 Ch. 318.

at the office, they would have found that those debentures existed, and they would naturally have asked what was the form of the debentures, and they would have been told that the form of the debenture was a charge upon every particle of the company's property and assets of every description. Then if, under those circumstances, and knowing all that, they still dealt with the company, they must do so at their own peril. The Legislature has protected them by giving them an opportunity of ascertaining all the facts, and if they will disregard all those things, and give credit as if there were no mortgage or charge, it is their own fault.

Therefore upon all these grounds I come to the conclusion that the creditors had notice of the priority of this particular class of creditors.

I was rather impressed with the argument that all which the Legislature requires with regard to the registration of these mortgages had not been done. And I am of opinion that the 43rd section of the Act of 1862 has not been complied with. Upon looking at the register of mortgages, I find it merely states the date of the bond, the date of the issue, the name of the person to whom issued, his address, the amount of bond when paid, and so forth, but there is not the slightest allusion to what property is comprised in the debenture, nor is there any column for it, and therefore I am of opinion that the law has not been complied with.

Then does that affect the debenture-holders? This matter has been before the Court on various occasions, once before me in *In re Wynn Hall Coal Company* (1), where the directors of the company held a large number of mortgages. [His Lordship then stated the facts of that case.] Now if the mortgages here had been held by directors, that case would, in my opinion, have been completely applicable, because they would, after neglecting their own duty, have been seeking to come in competition with their own creditors. In the case of *In re General Provident Assurance Company* (2) the point was argued whether the omission to register invalidated a mortgage by the deposit of title-deeds, and I held that, although the mortgage was not registered, it was perfectly good against the company, because the bankers of the company were not officers of the company, and could not suffer because

(1) Law Rep. 10 Eq. 515. (2) Law Rep. 14 Eq. 507.

C. A. 1876 *In re* General South American Co. Judgment, V.-C. M.

registration had been omitted. So in this case, the mortgage not being in favour of an officer or director of a company, but only in favour of ordinary shareholders who had no control over the books, who had no duty to perform as to registration, I must come to the conclusion, although I think the law has not been complied with, that the innocent holders of the debentures cannot be affected on account of the non-performance of the duty by the officers of the company in not keeping the register in a proper form.

Upon all these grounds, therefore, and very reluctantly, looking at the nature of the transaction, I feel myself bound by the authorities to come to the conclusion that these debentures did create a charge upon all the property of the company, and have a priority over the debts due to the general creditors of the company.

C. A. From this decision the official liquidator appealed, and the appeal came on for hearing before the Court of Appeal on the 22nd of March.

Argument. *Glasse*, Q.C., and *Cookson*, Q.C., for the Appellant, opened the appeal on the ground that the register was not properly kept, and therefore the debentures had no priority, and cited *Ex parte Valpy & Chaplin* (1).

Judgment, C. A. The Court (*James*, L.J., *Mellish*, L.J., and *Baggallay*, J.A.) said that there the debenture-holders were officers of the company; here they were not, and were not to be injured by the neglect of the officers. Their Lordships dismissed the appeal with costs.

Kekewich, for the creditors.

Cotton, Q.C., *Higgins*, Q.C., and *Everitt*, for the debenture-holders.

Solicitors: *Abrahams & Roffey; Freshfields & Williams; Clarke, Rawlins, & Clarke.*

(1) Law Rep. 7 Ch. 289.

In re NATIVE IRON ORE COMPANY.

C. A.
1876
March 29.

Debenture—Directors—Register—25 & 26 *Vict.* c. 89, s. 43.

Three directors of a company advanced money to the company and took as security a debenture, giving a general charge on the undertaking. The debenture was registered, but the register contained no description of any property as charged:—

Held, that the debenture was not valid as against the creditors of the company.

Statement.

THE Petitioners in this case, Sir *H. Elphinstone*, *G. Rosser*, and *H. D. Marsh*, had been three of the directors of the *Native Iron Ore Company, Limited*, and money being wanted for the purposes of the company, they on the 7th of August, 1874, advanced, for the use of the company, £800, taking, by way of security for repayment, a debenture whereby the company declared themselves bound, and charged the "undertaking, and all sums of money arising therefrom, and all the estate, right, title, and interest of the company therein," with the payment of £800 and interest at the rate of 10 per cent. The company was ordered to be wound up in the Court of the Lord Warden of the Stannaries. The Vice-Warden made an order declaring that this debenture was good and valid against the general creditors of the company; but upon a rehearing he discharged this order, on the ground that, though the debenture was registered by the company, the register merely stated the dates, the names, and the addresses of the parties, but contained no description of property charged as required by the *Companies Act*, 1862 (1).

(1) 25 & 26 Vict. c. 89, s. 43: "Every limited company under this Act shall keep a register of all mortgages and charges specifically affecting property of the company, and shall enter in such register, in respect of each mortgage or charge, a short description of the property mortgaged or charged, the amount of charge created, and the names of the mortgagees or persons entitled to such charge. If any property of the company is mortgaged or charged without such entry as aforesaid being made, every director, manager, or other officer of the company who knowingly and wilfully authorizes or permits the omission of such entry shall incur a penalty not exceeding fifty pounds."

C. A.
1876
In re NATIVE IRON ORE CO.
Argument.

The debenture holders appealed.

Eddis, Q.C., and *Hornell*, for the Appellants:—

This debenture is registered, and any creditor who examined the register must see that it existed, and was a charge on the property of the company; at all events he was put on inquiry, and cannot complain of having been deceived. The directors thought this a sufficient register, and so it is. In *Ex parte Valpy & Chaplin* (1) there was no register at all. In *In re Wynn Hall Coal Company* (2) there was negligence. This money was *bonâ fide* advanced, and it will be a great injustice that the directors should lose it on account of an error which can have done no wrong to any one. The directors may be liable to penalties for neglect, but the mortgage is good.

N. Lawrence, for the official liquidator.

Judgment, Mellish, L.J.

MELLISH, L.J.:—

6 Ch D 560

I am of opinion that the decision of the Vice-Warden in this case is perfectly right. It is an established rule that where a director or officer of a limited company advances money on the security of a debenture or mortgage of the company and omits to register it in accordance with the Act, the consequence is that he has no charge as against the creditors. The point was, in the first instance, so decided by the Vice-Chancellor *Malins* in the case of *In re Wynn Hall Coal Company*, and by the late Master of the Rolls in *Ex parte Valpy & Chaplin*, and that decision was afterwards affirmed on appeal. The rule so established is, in my opinion, founded on a perfectly good equitable principle.

The question now raised is whether there is any distinction in principle between not registering a mortgage at all, and registering it, but omitting the essence of that which the Act intended to be stated on the register, viz., a description of the property intended to be charged. It would be absurd to make such a distinction. Indeed the omission of a statement of the property charged would

(1) Law Rep. 7 Ch. 289. (2) Law Rep. 10 Eq. 515.

be more calculated to deceive than an omission to register at all. The appeal must be dismissed with costs.

C. A.
1876
In re
NATIVE IRON ORE CO.
Judgment.
Baggallay, J.A.

BAGGALLAY, J.A. :—

I entirely concur, and I adopt the language used by Lord Justice *James* in the case of *Ex parte Valpy & Chaplin* (1), that "every one standing in a fiduciary position towards the company is bound to see that the company obeys the directions of the Legislature, and I am of opinion that the failure of the Appellant to do so is fatal to his case." So in the present case the duty of these directors was to see that their debenture was registered according to the provisions of the Act, which are strict, distinct, and precise. *In re Wynn Hall Coal Company* (2) was an exactly similar application, and it was decided in that case that the debenture holders had no lien.

6 Ch D 561

In the case of the *General South American Company* (3) none of the debenture holders were directors. There, also, the register was not perfect; but the defect was held not to be the fault of the debenture holders, but of the directors, and the debenture holders established their charge.

JAMES, L.J., concurred.

Solicitors: *Saunders & Co.; Gregory, Rowcliffes, & Co.*, agents for *Hodge, Hockin, & Marrack, Truro.*

(1) Law Rep. 7 Ch. 289. (2) Law Rep. 10 Eq. 515.
(3) *Ante*, p. 337.

C. A.

V.-C. H.
1875
Nov. 4.

C. A.
1876
Feb. 2, 19;
March 17.

WAKE *v.* VARAH.

[1874 W. 288.]

Will—Construction—Survivor—Other.

A testator gave the residue of his property to trustees, on trust to pay and divide the income equally among his three children, during their respective lives, and after the death of each child the share of the fund to the income of which the deceased child was entitled for life was to be in trust for his or her issue. And in case, and so often as, any of the three children should die without leaving issue, the share to which such child should become entitled during his or her life, as well originally as by survivorship or accruer, was to be in trust for the survivors or survivor of the children, during their, his, or her respective life or lives, and in equal shares if more than one. And, after the decease of each such survivor, the surviving or accruing share, to which such survivor for the time being should become entitled for his or her life, was to be in trust for his or her issue. And, in case all the testator's children should die without leaving issue, the fund was to be in trust for the representatives of the survivor.

After the death of the testator one of his children died without issue, then another child died leaving issue, and, lastly, the third child died without issue:—

Held, that the issue of the second child, though she was not the survivor, became entitled on the death of the third to the whole of the fund.

Decision of *Hall*, V.C., affirmed.

Waite v. *Littlewood* (1) and *Badger* v. *Gregory* (2) followed.

Statement.

JOHN WOODHOUSE, by his will, dated the 18th of July, 1835, devised and bequeathed to trustees all his real and personal estate not previously disposed of, upon trust to permit his wife to live in his house during her life, and to pay her an annuity of £100 during her life; and he directed that his trustees should stand possessed of the residue of the income of his said property, in trust from time to time to pay and divide the same amongst his three children, *Mary Ann*, *Ann*, and *William Woodhouse*, during their respective lives, in equal shares; and after the decease of each of his said children the trustees were to stand seised and possessed of the share of his said property of which the child so dying should become entitled to the income during his or her life as aforesaid, in trust for his, her, or their issue as therein mentioned; "and in

(1) Law Rep. 8 Ch. 70. (2) Law Rep. 8 Eq. 78.

case, and so often as, any of my said three children shall die without leaving issue, the said trustees or trustee for the time being shall stand seised and possessed of the share to which such child for the time being dying without leaving issue as aforesaid shall become entitled during his or her life, as well originally under the trusts aforesaid as by survivorship or accruer under this present clause, in trust for the survivors or survivor of my said children during their, his, or her respective life or lives, and in equal shares if more than one; and, after the decease of each of such survivors, the said trustees or trustee for the time being shall stand seised and possessed of the surviving or accruing share of my said property to which such survivor for the time being shall become entitled for his or her life under the trusts aforesaid," in trust for his or her issue as therein mentioned; "and in case all my said children shall die without leaving issue as aforesaid, then in trust for the heirs, executors, administrators, and assigns of the survivor, according to the nature and title thereof respectively."

The testator died on the 5th of September, 1835. His wife and his three children survived him.

William Woodhouse died on the 14th of February, 1846, without having been married. The testator's widow died on the 5th of April, 1867. The testator's daughter *Ann* married *George Varah*, and she died on the 7th of June, 1859. She left three children, *George Varah*, *Arthur Varah*, and *Marianne Varah*, who all attained twenty-one, and were Defendants to this suit. The testator's daughter *Mary Ann* married *William Addy*, and died on the 25th of March, 1874, without having had any issue. *William Addy* had died on the 1st of July, 1864. On the 25th of September, 1869, *Mary Ann Addy* assigned her share in the residue of the testator's estate to the Plaintiff, *Bernard Wake*.

The Plaintiff alleged that on the death of *Mary Ann Addy* without issue, there was an intestacy as regarded one moiety of the residue of the testator's estate; and that in the events which had happened the Plaintiff was entitled to *Mary Ann Addy's* share of the residue. And the bill prayed for a declaration to that effect.

The case was argued before Vice-Chancellor *Hall*, on the 4th of November, 1875.

C. A.

1876

WAKE v. VARAH.

Dickinson, Q.C., *W. S. Owen*, and *Charles Gould*, for the Plaintiff.

Eddis, Q.C., *Cookson*, Q.C., *Chapman Barber*, and *T. F. Kirby*, for the Defendants, were not called on.

Judgment, V.-C. H.

HALL, V.C.:—

It appears to me that the moiety in question has gone over under the trusts of this will in favour of the issue of the daughter who has died leaving issue. The case seems to me to be one upon the frame of the will itself, materially aided by the gift over. There must be a construction put upon the will which will give effect to what I think is the manifest intention of the testator, that the whole of this fund should, if there should be only one of the three children who should have issue, go to the issue of that one. It is not upon any technical reading of the word "survivor" as intended to mean "other," but it is upon the whole construction of the instrument that I decide. So far as authority can determine a case of this kind, I take leave to say that I decide the case on the view of the whole will, and to my mind the use of the word "survivor" in a will of this kind is to be quite explained, and accounted for, and justified, if I may say so, by the fact that the persons who were to take under the gift over were to take only for life, and then the fund was to go to the children. Hence the use of the word "survivor," because that is descriptive, and accords with the kind of estate which is to be taken by those persons who are only to take for life. That construction is placed beyond all reasonable doubt, to my mind, by the gift over. The general observation in argument was, that it was very unreasonable to suppose that the children were intended to take only if their parent, who was merely to be tenant for life, should take. It may be that that would not suffice, as has been said in some cases. But then you have, in addition to that, in this particular case, the gift over, which cannot take effect in the event which has happened. The Plaintiff's argument is that the will is incomplete, and that it is a case of intestacy. The Court does not lean to that construction. On the contrary, it leans to the construction which makes the disposition completely perfect, to the construction which provides in a sensible and reasonable way for the persons who are

undoubtedly the object of the testator's bounty, particularly in the case of a parent who is making provision for his children and their issue. Those considerations prevailed in the case before Lord *Selborne*, where all the authorities were considered — I mean *Waite* v. *Littlewood* (1). In that case there was a provision made for children, which is, in substance, not distinguishable from the present. In that case the word "survivors" was used. "Survivors" only were to take for life, and then the property was to go to the children. There was in that case a gift over, as in the present, in case of all the children leaving no issue. I do not think it necessary to occupy time in going through the judgment, which expresses what I have endeavoured to explain, though in much better language.

C. A. 1876 WAKE v. VARAH. Judgment, V.-C. H.

Therefore I hold that to be the true construction of this will. I might have referred to other cases, but I do not think it necessary to do so.

From this decision the Plaintiff appealed, and the appeal came on to be heard before the Court of Appeal on the 2nd and 19th of February, 1876.

C. A.

Dickinson, Q.C., *W. S. Owen*, and *Charles Gould*, for the Plaintiff:—

Argument.

The scheme of the gift is to provide for a series of survivorships. Down to the ultimate gift over there is nothing to shew that the word "survivor" is to be understood in any other than its ordinary sense, and the gift over is not of itself sufficient to alter that meaning. *Waite* v. *Littlewood* and *Badger* v. *Gregory* (2) are distinguishable.

[They also cited *Leeming* v. *Sherratt* (3); *In re Corbett's Trusts* (4); *Winterton* v. *Crawfurd* (5).]

Cookson, Q.C., and *T. F. Kirby*, for two of the children of *Ann Varah*:—

On the face of the will there is an inaccuracy in the use of the words "survivors or survivor" when dealing with an accrued share.

(1) Law Rep. 8 Ch. 70.
(2) Ibid. 8 Eq. 78.
(3) 2 Hare, 14.
(4) Joh. 591.
(5) 1 Russ. & My. 407.

C. A. 1876 WAKE v. VARAH. Argument.

As there were only three children of the testator, there could not be more than two of them who could have accrued shares. The object of the testator was to provide for the families of his three children; if the *stirps* survives, the idea of outliving is satisfied. What may be called the "stirpical" construction ought to be adopted.

[They referred to *Hurry* v. *Morgan* (1); *Milsom* v. *Awdry* (2); *In re Arnold's Trusts* (3).]

Eddis, Q.C., and *Chapman Barber*, for the other child of *Ann Varah*:—

If "survivor" is read "other" everything is made clear.

[They cited *In re Tharp's Estate* (4); *Doe* v. *Wainewright* (5).]

Gould, in reply, cited *Dorin* v. *Dorin* (6).

Judgment, C. A. Baggallay, J.A.

Mar. 17. BAGGALLAY, J.A.:—

The testator in this cause, by his will dated the 18th of July, 1835, made certain dispositions of his residuary real and personal estate in favour of his three children and their issue; and the question involved in the present appeal is, whether, according to the true construction of the will, and in the event which has happened of the longest liver of the three children dying without issue, there is an intestacy as regards that portion of the corpus of the testator's estate, to the income of which that child was entitled for life; or, whether the same is effectually disposed of by the will in favour of the children of the testator's daughter *Ann*, who was his only child that left issue.

The Appellant, who is the Plaintiff in the cause, contends that a literal interpretation ought to be put upon the words "survivors" and "survivor" where they occur in the will, and that, if such interpretation be adopted, the event which has happened is not provided for by the testator, and that there is consequently an intestacy.

(1) Law Rep. 3 Eq. 152.
(2) 5 Ves. 465.
(3) Law Rep. 10 Eq. 252.
(4) 1 D. J. & S. 453.
(5) 5 T. R. 427.
(6) Law Rep. 7 H. L. 568.

The Respondents, on the other hand, insist that it is evident from the portion of the will in which these words occur that they were not used by the testator in their literal sense, and that, inasmuch as the intention of the testator can be ascertained with reasonable certainty from an examination of the whole will, a modified or qualified interpretation should be put upon the language used by him so as to give effect to that intention.

The decision of the Vice-Chancellor was in favour of the Respondents, and from that decision the present appeal is brought.

I think that the principle applicable to questions of this kind was accurately stated by Lord *Hatherley*, when Vice-Chancellor, in *In re Corbett's Trusts* (1), in which the question was whether the word "survivor" should be read as "other," and in which he expressed himself as follows (2):—"I am bound to say that the later authorities lean more strongly than the earlier ones to the strict construction of words; although in cases where it is necessary to do so in order to render a will intelligible, or where a clear and necessary inference can be drawn from the terms of the will, the Court will not hesitate to construe the words 'survivors or survivor' as 'others or other.'" What, then, is the proper construction to be put upon the testator's will in the present case? The testator, after giving the income of his residuary estate to his three children, *William*, *Ann*, and *Mary Ann*, in equal shares during their respective lives, directs that, upon the decease of each, the share of his property, to the income of which such child shall have been entitled for life, shall be held in trust for his or her children or more remote issue. Upon this it may be observed that the testator's three children and their issue were the primary objects of his bounty, and I think it a fair inference that he intended that there should be equality as between the three *stirpes*, and that as regards each *stirps* there should be a life estate, followed by a distribution of capital amongst the issue of the tenant for life. Had any one or more of his children predeceased the testator, their issue, if any, would have been entitled, notwithstanding the failure of the life estate.

The testator, having thus provided for the event of each of his children leaving issue, proceeds next to provide for the event of

(1) Joh. 591. 6 Jur. N.S. 339 (2) Joh. 596. 6 Jur. N.S. 340

C. A. 1876 WAKE v. VARAH. Judgment, C. A. Baggallay, J.A.

any one or more of them dying without leaving issue; and it is upon the construction to be put upon these provisions that the arguments before us have chiefly turned. The testator directs that, on the death of any of his children without leaving issue, the survivors or survivor of them shall receive, during their, his, or her lives or life, the income of the share to which the deceased child was entitled for life; and that, after the decease of each such survivor, the corpus of the surviving or accruing share, to the income of which such survivor shall so become entitled for life, shall be held in trust for his or her issue.

Now, as regards the estate for life, which is thus given in an accruing share, it is immaterial whether the words "survivors or survivor" are literally interpreted, or read as "others or other," since no child of the testator could take a life estate in an accruing share unless he or she survived the child whose death occasioned the accretion; but, when we come to the gift to the issue, which is to take effect upon the determination of the life estate, we at once perceive that, if the literal interpretation be adopted, the title of the issue of a deceased child to participate in any benefit from an accrued share is made to depend upon the accident of their parent surviving the brother or sister whose share is given over; a provision of a most capricious character, and entirely inconsistent with the intention of the testator, as indicated by the original gift.

But the adoption of the literal interpretation would not only lead to the capricious and unsatisfactory result to which I have just alluded, but would have resulted in an intestacy in several not only possible but probable events, including that which has actually occurred.

Now what has occurred is this: *William*, the child who first died, did not leave issue; *Ann*, who died next, left issue; and *Mary Ann*, who died last, left no issue. Upon the death of *Mary Ann*, if the literal interpretation be adopted, there was, so far as the provisions to which I have as yet referred are concerned, an intestacy as regards the corpus, not only of her original share, but of the moiety of *William's* share to which she succeeded for life on his death without issue.

But neither the consideration that a literal interpretation of the

Judgment, C. A.
Baggallay, J. A.

language used would lead to intestacy in particular events, nor the consideration that such an interpretation would lead to a construction which, if really intended by the testator, would have been capricious, would justify the Court in attributing to the language used by the testator other than its literal interpretation, unless satisfied, upon a consideration of the whole contents of the will, not only that the language used was insufficient to effect his full intention, but that the will itself afforded sufficient evidence of what his intention was. Now the provisions, the effect of which I am now considering, are introduced by the words, "In case and so often as any of my said three children shall die without leaving issue," thus indicating the intention of the testator to provide for the death of the longest liver of his three children, as well as for the deaths of the two who should previously die. But, if the words "survivors or survivor" receive their literal interpretation, the death without issue of the longest liver is clearly unprovided for, inasmuch as on the death of the longest liver there can be no survivor. It is apparent, then, from these provisions alone, that the testator has not used language adequate to provide for all the events for which he has expressed his intention to provide; but, though we may surmise in what way the testator would have supplied the deficiency, had his attention been directed to it, these provisions afford no clear evidence as to what his intentions were.

But the next provision in the will supplies the necessary clue. It is as follows: "And, in case all my said children shall die without leaving issue as aforesaid, then in trust for the heirs, executors, administrators, and assigns of the survivor." From this it is evident, not only that the testator intended to provide, and considered that he had provided, in the previous portions of his will for all possible events in which any of his children might have sued, but also that it was his intention, if there was any such issue, whether of one child or more, that that issue should become entitled to his property.

If the clauses in the will which have given rise to the questions in this cause had been omitted, and this concluding clause had followed immediately after the original gift to the children and

C A. 1876 WAKE v. VARAH. Judgment, C. A. Baggallay, J.A.

their issue, there could not have been any doubt but that cross limitations should be implied between the testator's children and their respective issue. The judgment of Lord Justice *Knight Bruce* in *Re Tharp's Estate* (1) was to this effect, and the case of *Doe* v. *Wainewright* (2) shews that a similar rule of construction was adopted at an early period in reference to a deed.

If this be so, can the fact that the provisions to which allusion has been made are interposed between the original gift and the gift over, make any difference? I think not. These provisions, insufficient as they are to effect the testator's full intention, not only do not contain anything inconsistent with an implication of cross limitations, but, on the contrary, so far as they go, they give effect to them.

Upon the whole, I am of opinion that, according to the true construction of the testator's will, the share, as well accrued (if any) as original, of any child who should die without leaving issue, was to go over to the other children and their issue *per stirpes*, and to be enjoyed by them in the same course of devolution as their original shares.

The practical result is, that the children of the testator's daughter *Ann*, or those who claim through them, became entitled upon the death of *Mary Ann* to the fund of which *Mary Ann* was entitled to the income for life.

This was the view taken by the Vice-Chancellor, who, in the course of his judgment, referred to the case of *Waite* v. *Littlewood* (3), and expressed his concurrence in what was said in that case by Lord *Selborne*.

As *Waite* v. *Littlewood* has been particularly referred to in the course of the arguments, I need not allude to it further than to say, that I am unable to distinguish in principle the present case from it, and that I should have been quite content to rest my decision upon its authority, had we not been pressed by an argument based upon the particular phraseology adopted in the will which we have had under consideration.

The appeal should, in my opinion, be dismissed with costs.

(1) 1 D. J. & S. 458. (2) 5 T. R. 427.
(3) Law Rep. 8 Ch. 70.

JAMES, L.J. :—

I agree with the judgment just pronounced.

It was conceded in the argument for the Appellant before us, that it was necessary, in order to support his contention, either to overrule the case decided by Lord *Selborne*, or to distinguish it. It would not be right to overrule the decision of a Court of co-ordinate jurisdiction, unless we were very clearly satisfied that it was wrong; and it would lead to endless confusion and interminable litigation if the Courts were to make or find minute differences in the language of instruments for the purpose of escaping from the authority or apparent authority of previous decisions. With respect to wills in particular, it is far better to have settled rules which will enable the members of families to know what the law gives them, than that every variation of language used by a testator, or his lawyer, should entail on family after family the costs, the heartburning and misery of litigation. To my mind it is absolutely impossible to make any distinction between the case before Lord *Selborne* and the present case, except that the ultimate gift here is expressed to be to the survivor's heirs, executors, administrators, and assigns.

I am unable to attach any weight to that distinction as affecting the construction of the previous parts of the will. If it had been to the next of kin, or to a stranger, or to a charity, the effect would have been, in my view, exactly the same. In each case it shews the testator's intention to make a complete disposition of his property, extending to the contingency of the primary objects of his bounty, his own descendants, having all disappeared, and in each case it shews that, in his own view of his previous dispositions, he had left only that contingency to be provided for. The fact that the ultimate gift is to the survivor does not enable us to imply, or even to guess, that the word "survivor," as previously used by him, was to receive a more literal meaning than it had received when used by other testators. He was providing for his children and their descendants, and if, on the death of his last child, there should be no descendant, it was about as reasonable and sensible a thing as a man could do to give the full disposition of the property to the last child. The only object for cutting down a child to a life estate was to benefit the other children, and to benefit the

C. A. 1876

WAKE v. VARAH.

Judgment, C. A. James, L.J.

grandchildren, and, given the case (which might well have happened) of no child having left a child, then the fund and estate would be very naturally allowed to remain at the disposition of the child to whom the actual possession and enjoyment of it had happened to survive. I adhere to my decision, as Vice-Chancellor, in *Badger* v. *Gregory* (1); I entirely concur in the judgment of Lord *Selborne;* but I desire emphatically to base my decision on the paramount importance of maintaining unshaken decisions which may be so beneficial in preventing disputes and litigation. Whether there ever was in the earlier cases a too lax interpretation of the word "survivor" is, in my opinion, a matter of no consequence. A whole category of cases has now settled that "survivor" may be read "other" or "surviving *stirps*," and has settled with reasonable clearness under what circumstances it may be so read, and no plain man, not a lawyer, would have had the slightest doubt in any of those cases that the real intention of the testator was effectuated thereby.

7 Ch D. 261,

Cleasby, B.

CLEASBY, B.:—

I entirely agree in the judgments, and I only wish to add the following observations:—

It appears to me that the whole of that part of the will which has been referred to is properly read as one disposition of property in favour of the three children and their issue, with benefit of survivorship when any one of them dies without issue, and that the final clause is the appropriate termination of such a disposition, expressing the testator's intention by what he was doing to benefit his three children and their issue, and no one else.

I quite agree with the argument of the learned counsel for the Appellant, that it would be impossible, by the operation of the final clause taken by itself, to raise any estate by implication in the issue. But that clause sufficiently shews that the testator had in his mind the existence of the issue of any child at the death of the longest liver as a fact which would prevent the disposition from taking effect. For he does not say, in case the survivor dies without leaving issue, but in case all my children shall die without leaving issue. Thus the testator clearly recognises the

(1) Law Rep. 8 Eq. 78.

status or claim of the issue of a child who has died before the survivor.

We must read this in connection with the previous limitation of the accruing share to the issue of children, and we have, I think, a sufficiently clear expression of the intention of the testator, that the issue should not take an interest contingent upon the parent surviving; but that the contingency of survivorship applies to the estate for life of the parent. The contingency is found in the use of the word "survivor," and the real intention would be properly expressed by saying, that, if one of the children died without leaving issue, his or her share should go to the remaining child or children for life, if they survived, and afterwards to their issue.

I think the case is decided by that of *Waite* v. *Littlewood* (1), and I think the language of the will in the present case is stronger than it was in that case in favour of the construction adopted, because here there is a clearer intention to benefit the children and their issue, and no one else. I also prefer resting the conclusion upon grounds similar to those stated by Lord *Selborne* in that case, rather than adopting any canon of construction by reading one word to signify another.

Solicitors for Appellant: *Dobinson, Geare, & Son.*

Solicitors for Respondents: *Pitman & Lane,* agents for *Fretson & Son, Sheffield; Bell, Brodrick, & Gray,* agents for *Rodgers, Thomas, Swift, & Ashington, Sheffield.*

(1) Law Rep. 8 Ch. 70.

M. R. 1876 March 25.

In re MANCHESTER AND LEEDS RAILWAY COMPANY. *Ex parte* GASKELL.

Practice—Railway Companies—Amalgamation—Payment out of Court—Costs—Apportionment.

Portions of the same estate were taken by four different companies, three of which were afterwards amalgamated :—

Held, that the costs of a petition for payment out of the purchase-moneys must be borne by the subsisting companies equally.

In re Maryport Railway Act (1) not followed.

Statement.

THIS was a petition for payment out of Court of four sums paid in as the purchase-moneys of different portions of the same estate, which had been taken by four railway companies. These sums were as follows: £11,505 6*s.* 3*d.* paid in by the *Manchester and Leeds Railway Company*, now amalgamated with the *Lancashire and Yorkshire Railway Company*; £1275 18*s.* 9*d.* paid in by the *Kenyon and Leigh Junction Railway Company*, now amalgamated with the *London and North Western Railway Company*; £300 paid in by the *Calder and Hebble Navigation Company*, also now amalgamated with the *London and North Western Railway Company*; and £887 10*s.* paid in by the *London and North Western Railway Company*. The only question was as to how the costs of the petition were to be borne as between the companies.

Argument.

Chitty, Q.C., and *W. H. Deverell*, for the petition.

Speed, for the *London and North Western Railway Company*, submitted that the costs ought to be apportioned according to the amounts paid in by the companies. It was, no doubt, laid down in *Ex parte Bishop of London* (2) that, as a rule, the costs ought to be borne by the companies equally; but that does not apply where there is great inequality in the amounts of the funds: *Ex parte Governors of St. Bartholomew's Hospital* (3).

(1) 32 Beav. 397. (2) 2 D. F. & J. 14. (3) Law Rep. 20 Eq. 369.

M. R.
1876
In re MANCHESTER AND LEEDS RAILWAY CO. *Ex parte* GASKELL.
Judgment.

J. L. Bird, for the *Lancashire and Yorkshire Railway Company*, submitted that that company ought to bear only one-fourth of the costs, and that the remaining three-fourths ought to be borne by the *London and North Western Railway Company*: *In re Maryport Railway Act* (1).

JESSEL, M.R. :—

Mr. *Bird* has certainly produced authority for his proposition, but it seems to me that the reason of the thing is all the other way.

Two railway companies are Respondents to this petition, and it was decided in *Ex parte Bishop of London* (2) that in such cases the costs are to be borne equally by the companies, unless there are special circumstances. The petition is for payment out of the fund in Court, and it does not appear to me that where that is the object of the petition there can be any special circumstances. Where the petition is for reinvestment in land I can readily understand that there may be; it may make a very great difference whether £10,000 or £100 is to be reinvested, as to the costs of investigating the title of the land purchased, and the conveyance, and the stamp, and so forth. But where the petition asks simply for payment out, the costs are exactly the same, whether the fund is £10,000 or £100. I cannot, therefore, accede to Mr. *Speed's* argument, that the costs should be apportioned according to the amount of the funds paid in by the companies.

On the other hand, I cannot agree with Mr. *Bird*. When two companies are amalgamated, the new company is only liable to pay such costs as are properly payable at the date of the petition. If the fund in Court had been paid in by three companies, all of which were now amalgamated with the *London and North Western Railway Company*, I should not allow three petitions to be presented for the purpose of getting out the separate portions of the fund; if such a thing were done I should certainly give only one set of costs against the company. That being so, a petition is presented in respect of which the *London and North Western Railway Company* is liable to one set of costs, and the *Lancashire and*

(1) 32 Beav. 397. (2) 2 D. F. & J. 14.

M. R. 1876 *In re* MANCHESTER AND LEEDS RAILWAY CO. *Ex parte* GASKELL.

Yorkshire Railway Company is also liable to one set of costs; and under these circumstances I think the costs must be borne by the two companies equally. I admit that there is a decision the other way, but for the reasons I have given I am unable to follow it.

Solicitors: *Wing & Ducane; R. F. Roberts; Clarke, Woodcock, & Ryland.*

M. R. 1876 *April* 1.

In re JONES' WILL.

Marriage Settlement—Covenant to settle after-acquired Property—Vested Reversionary Interest.

6 Ch D. 621-4

By a marriage settlement the intended husband and wife severally covenanted with the trustees that all the real and personal property (if any) not thereinbefore settled, to which the wife, or the husband in her right, "shall at any time or times during the said intended coverture become beneficially entitled in possession or reversion, or in any manner whatever, derivable directly or indirectly from" *J.*, should be settled as therein mentioned. At the date of the settlement and of the marriage the wife was entitled to a fund bequeathed by *J.*, subject to the life interest of a person who outlived the wife:—

Held, that the fund was not subject to the covenant.

In re Viant's Settlement Trusts (1) not followed.

Statement.

PETITION.

Mary Jones, widow, by her will dated the 19th of May, 1842, bequeathed a sum of cash and a sum of consols to *John Jones*, *Thomas Burlton*, and *Charles Thomas Fearnley* (whom she appointed executors of her will), upon trust for her daughter, *Sophia Fearnley*, for her life, and after her death, in case there should be no child of *Sophia Fearnley* (which event happened), for all other the testatrix's children who might be then living, and the issue of any child then dead leaving issue, such children and issue to take as tenants in common, but so, nevertheless, that the issue of any deceased child should take their parents' share.

The testatrix died in July, 1842, leaving three children, one of whom, *Emma Eliza Fearnley*, married *Michael Tunnacliffe*, and died in the lifetime of *Sophia Fearnley*, leaving an only child,

(1) Law Rep. 18 Eq. 436.

M. R.
1876
In re
JONES' WILL.
Statement.

Florence Mary, who in August, 1869, became the wife of the Petitioner, *Charles Harding Dimont*.

By the settlement on the marriage it was declared that *Charles Thomas Fearnley* and *Randall Glynes* should stand possessed of certain interests to which Mrs. *Dimont* was entitled under the will of *Mary Jones* (not including any interest in the sums thereby bequeathed in trust for *Sophia Fearnley* for life) upon certain trusts for the benefit of Mrs. *Dimont* and her husband and children. The settlement continued :—

"And this indenture further witnesseth, that in pursuance of the agreement in that behalf, and in consideration of the said intended marriage, each of them the said *Charles Harding Dimont* and *Florence Mary Tunnacliffe* doth hereby for himself and herself, and his and her heirs, executors, and administrators, covenant with the said *Charles Thomas Fearnley* and *Randall Glynes*, their executors and administrators, that if the said intended marriage shall take place, all the real and personal property (if any) not hereinbefore settled to which the said *Florence Mary Tunnacliffe*, or the said *Charles Harding Dimont* in her right, shall at any time or times during the said coverture become beneficially entitled in possession or reversion, or in any manner whatever, derivable directly or indirectly from the said *Mary Jones* deceased, or which shall have at any time passed to any person or persons under her will (except furniture, jewellery, and household stuff, which it is declared shall belong to the said *Florence Mary Tunnacliffe* for her sole and separate use), shall, as soon as circumstances will permit, and at the cost of the trust estate, be assured and transferred unto, or otherwise vested in the trustees or trustee for the time being of these presents, upon trust to sell and convert the same into money, and to stand possessed thereof and of the proceeds of any such sale and conversion upon the same trusts as are herein declared."

Mrs. *Dimont* died in May, 1874, having by her will, dated the 24th of January, 1871, devised and bequeathed all her real and personal estate to the Petitioner, whom she appointed sole executor of her will, and he afterwards obtained letters of administration with the will annexed to her estate. She left one child only, namely, the Respondent *Charles Tunnacliffe Dimont*, an infant.

M. R. 1876 — *In re* JONES' WILL.

Statement.

Sophia Fearnley did not die until the 6th of June, 1875, so that the one-third share of the fund to which Mrs. *Dimont* was entitled as the only child of Mrs. *Tunnacliffe* did not fall into possession during the coverture.

A question being raised as to whether Mrs. *Dimont's* share was bound by the covenant in her marriage settlement, the trustees of *Mary Jones'* will paid £431, the amount of the share after deducting their costs, charges, and expenses, into Court under the *Trustee Relief Act.*

Argument.

B. B. Rogers, in support of the petition:—

I submit that the share is payable to the Petitioner as legal personal representative of his wife. During the coverture she did not become entitled in possession to it, nor can it be said that she, or the Petitioner in her right, became entitled to it in reversion, for she was already entitled in reversion before the coverture. It is clear on the authorities that the words "become entitled" are words of futurity: *In re Pedder's Settlement Trusts* (1); *Archer* v. *Kelly* (2); *In re Browne's Will* (3); *In re Clinton's Trust* (4).

Freeman, for the Respondent, *Charles Tunnacliffe Dimont*:—

This case cannot be distinguished from the most recent case on the subject, *In re Viant's Settlement Trusts* (5), in which Vice-Chancellor *Bacon* held that at the moment the priest's benediction was pronounced on the marriage, the husband "became entitled during the coverture" to that which was the wife's before.

Cree, for the trustees of the will.

Judgment.

JESSEL, M.R.:—

16 Ch D. 624

I must add one more decision to the numerous decisions on this question.

I regret that a point which in the case of *In re Pedder's Settlement Trusts* was said by the Judge to be virtually decided by

(1) Law Rep. 10 Eq. 585.
(2) 1 Dr. & Sm. 300.
(3) Law Rep. 7 Eq. 231.
(4) Ibid. 13 Eq. 295.
(5) Law Rep. 18 Eq. 436.

authority, should again have become open to discussion in consequence of the decision of Vice-Chancellor *Bacon*. The covenant provides that any property shall be settled to which the wife, or her husband in her right, should at any time or times during the coverture become beneficially entitled in possession or reversion, or in any manner whatever, derivable directly or indirectly from a particular source. Inasmuch as the tenant for life outlived the wife, it is clear that she did not, nor did her husband in her right, during the coverture become entitled in possession to a fund which was hers in reversion before the marriage took place. It is equally clear that the husband, during the coverture, did not become entitled in right of his wife. His title accrued, not during the coverture, but afterwards, when he took out administration to his wife's estate. The sort of inchoate title that he had during the coverture, depending on the possibility of the property falling into possession during the coverture, really amounts to no title at all. Property such as this is not property to which the husband or the wife "became entitled during the coverture." This was settled, until the case of *In re Viant's Settlement Trusts* (1), which is quite the other way. With the greatest respect to the learned Vice-Chancellor, I must decline to follow that case. I hold that the fund is not subject to the covenant.

Solicitors: *G. A. Hall*, agent for *A. W. Knott, Worcester; Cree.*

(1) Law Rep. 18 Eq. 436.

M. R.

1876

April 3.

In re METROPOLITAN BANK AND JONES.

Company—Voluntary Winding-up—Joint Liquidators—Death of Liquidator—Conveyance of Company's Property—Power of Surviving Liquidator—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 133, *sub-s.* 6.

Where two liquidators are appointed for the purpose of carrying into effect a resolution to wind up a company voluntarily, one of them cannot (unless directions to the contrary are given by the resolutions) use the seal of the company even for the purpose of carrying into effect an agreement made by both liquidators, and the validity of which is undisputed.

A company resolved to wind up voluntarily, and appointed two liquidators, who entered into a valid agreement for the sale of the assets of the company. Part of such assets consisted of a debt secured by a legal mortgage, and a proper legal assignment of the mortgage security was prepared; but one of the liquidators died before the seal of the company was affixed to it:—

Held, that the surviving liquidator had no power to affix the seal of the company, and that a new liquidator must be appointed in order that the assignment might be executed.

Statement.

THIS was a summons under the *Vendor and Purchaser Act*, 1874.

The *Metropolitan and Provincial Bank, Limited* (hereafter called the old company), was incorporated under the *Companies Act*, 1862. In 1866 resolutions were duly passed for winding up the old company voluntarily, with the view to the formation of a new company; and two liquidators were, by the same resolutions, appointed and were authorized to sell and transfer the business and goodwill, and also any part of the property of the old company, or to transfer the whole assets of the old company, to such new company; and in the name of the company to enter into all such agreements, and execute all such instruments, as might be necessary or expedient. The resolutions did not expressly authorize one liquidator to act.

The *Metropolitan Bank, Limited* (hereafter called the new company), was incorporated in 1866; and in June, 1867, an agreement was entered into whereby the old company and the liquidators agreed to sell all the property and assets of the old company to the new company. This agreement was executed by the liquidators, and the seals of the old and new companies were duly affixed thereto.

Among the assets of the old company was a debt due by one *F. J. Strange*, the payment of which was secured by a legal mortgage by way of demise to the old company, of certain leasehold property to which *Strange* was entitled. In 1869 *Strange* executed a deed whereby he assigned all his property to *R. E. Tyler* upon trusts for the benefit of his creditors.

Statement.

By an indenture dated the 5th of June, 1871, and expressed to be made between *R. E. Tyler* of the first part, *F. J. Strange* of the second part, the old company of the third part, and the new company of the fourth part, the parties thereto of the first two parts, for valuable consideration, and the old company (by reason of the new company having become entitled to all the assets of the old company) purported to assign the leasehold property to the new company free from all right and equity of redemption under the mortgage. This indenture was duly executed by *Tyler* and *Strange*, but the seal of the old company was omitted to be affixed thereto. Subsequently to the date of this indenture, one of the liquidators died, and there were now no creditors or contributories of the old company. The old company had not, however, been dissolved.

In 1875 the new company agreed to sell the property in question to *Edwin Jones*. Upon the title being investigated, the objection was raised that the legal estate remained in the old company. It was then proposed that the surviving liquidator should affix the seal of the old company to the indenture of the 5th of June, 1871; but it was objected that he had no power to do so. This summons was then taken out for the purpose of having the question determined, whether the surviving liquidator was competent to execute in the name and on behalf of the old company, and to affix the seal of that company to, any deed or deeds for the purpose of conveying the legal estate in the property contracted to be sold to the purchasers.

Argument.

E. Ward, for the *Metropolitan Bank*:—

The purchaser's objection is founded on the *Companies Act*, 1862, s. 133, sub-s. 6, which provides that "where several liquidators are appointed, every power hereby given may be exercised by such one or more of them as may be determined at the time of their appointment, or in default of such determination, by any number

M. R.
1876
In re METROPOLITAN BANK AND JONES.
Argument.

not less than two;" and if the matter was one which required any exercise of discretion, there might be some force in the objection. But the two liquidators have entered into a valid and binding agreement for the sale of the assets of the old company to the new. The deed of the 5th of June, 1871, merely carries that agreement into effect, by assigning the legal interest in part of the assets to the new company; and the affixing of the seal of the old company to that deed is a mere ministerial act which the surviving liquidator is competent to perform.

Chester, for the purchaser, was not called upon.

Judgment.

JESSEL, M.R., after stating the facts, continued:—

It is said that it is a mere ministerial act to convey the legal estate which remains vested in the old company; and so it is on the part of any one who has authority to use the seal of the company; but the question I have to consider is, whether any one has authority to use the seal. Now it is plain that the company has no power to affix the seal; and sect. 133, sub-sect. 6, of the *Companies Act* provides that where more liquidators than one are appointed two at least must act in the absence of any direction to the contrary. Here there is no such direction, and I am therefore of opinion that one liquidator cannot use the seal, and, consequently, that no person is at present authorized to use it. In order to execute a conveyance, a new liquidator must be appointed; and sect. 140 of the Act affords a means for doing this.

Solicitors: *Newman, Stretton, & Hilliard; Angove.*

VALLANCE *v.* BIRMINGHAM AND MIDLAND LAND AND INVESTMENT CORPORATION.

V.-C. M.
1876
March 10

[1875 V. 8a.]

Judicature Act—Rules of Court, 1875, *Order* XVI., *rr.* 13, 14—*Defendants struck out of an Action.*

Where the Court is of opinion that a Defendant is an improper party to an action, it will order the name of such Defendant to be struck out of the record before the hearing, under Order XVI., rule 13, of the Rules of Court, 1875, notwithstanding he may have ~~filed~~ his statement of defence.

Statement.

THE statement of claim was to the effect that the Plaintiff *Vallance* was the owner of certain property near *Birmingham*, including 22,617 square yards of building land, and that this property was subject to certain mortgages which had been bought up by the Defendant *T. S. Fallows*, who had entered into a secret contract to sell the building land to the *Birmingham and Midland Land and Investment Corporation*, without notice to the Plaintiff, for an inadequate sum. That the Defendant *Fallows* insisted upon completing the sale to the Defendant corporation, and upon selling the rest of the property comprised in the mortgages.

The Plaintiff claimed to have the sale of the building land declared void, and to have an injunction granted to restrain the completion of the sales without notice to the Plaintiff; to have an account of what was due to the Plaintiff, and to have the costs of this action paid by the Defendants.

The Defendants, the *Birmingham and Midland Land and Investment Corporation*, by their statement of defence, said they believed *T. S. Fallows* had taken a transfer of the mortgages upon several properties, including the building land, and had thereby become entitled to sell such building land to them in the manner in which it was in fact sold to them. They had agreed to purchase the building land from *Fallows* at the sum of 3*s.* 8*d.* per square yard, but there had been no secret agreement about it. They intended to hold *T. S. Fallows* to his bargain, and they submitted that a valid agreement for the sale of the land existed between them and the

V.-C. M. 1876

VALLANCE v. BIRMINGHAM AND MIDLAND LAND AND INVESTMENT CORPORATION.

Statement.

Defendant *Fallows*, and that the same ought to be specifically performed.

The Defendant *Fallows* submitted by his defence that he had full power to sell the building land, and that 3*s.* 8*d.* a square yard was, to the best of his belief, the best price which could be obtained for it. The sale to the Defendant company was in every respect *bonâ fide*, and ought to be carried into effect.

It appeared by the evidence that in another suit of *Callow* v. *Fallows*, to which the Plaintiff was a party, an order had been made by consent, the effect of which was that the sale to the *Birmingham and Midland Land and Investment Corporation* should be carried out, and the purchase-money be paid to *Fallows*, he undertaking to account for the same, and this was to be without prejudice to any questions in this action.

The case now came on upon motion on behalf of the Defendants, the *Birmingham and Midland Land and Investment Corporation*, for an order in pursuance of Order XVI., rule 13, of the Rules of Court, 1875, that the Defendant corporation might be struck out as Defendants in this action, and that the Plaintiff might be ordered to pay to these Defendants their costs of the action.

Argument.

Robinson, Q.C., and *W. P. Beale*, in support of the motion :—

This is precisely a case to which Rule 13 of Order XVI. applies. The Plaintiff was a party to a consent order in another suit of *Callow* v. *Fallows*, which estopped him from suing the *Birmingham and Midland Land and Investment Corporation*. The Defendants, therefore, are unnecessary parties to this suit, and ought to be struck out of the record, and the Plaintiff should be ordered to pay the costs for improperly bringing them before the Court.

Rigby, for *T. S. Fallows* :—

The Plaintiff has already commenced four actions against *Fallows* for the money ordered by this Court to be paid to him The proceedings on the part of *Vallance* have been useless and vexatious.

Glasse, Q.C., and *Northmore Lawrence*, for the Plaintiff :—

The question is, whether a Defendant who has put in his state-

ment of defence, after which issue has been joined, can get out of the suit by a side-wind. Order XVI., rule 13, was not intended to meet a case of this kind, where issue has been joined.

MALINS, V.C.:—I am with you, Mr. *Robinson*, on all points but one, which is, that I do not see why you have put in any defence.

Robinson, in reply:—

Argument.

The intention of putting in the defence was to shew that from the time the consent order was made the suit was utterly useless as against us. Rule 14 of Order XVI. provides that the application which we now make may be made at any time before the trial or at the trial of the action; therefore the fact of our having filed our statement of defence cannot possibly be a bar to our coming here now.

MALINS, V.C.:—

Judgment.

So far as I am aware, this is the first application which has been made under Rule 13 of Order XVI. The motion is to strike out the name of the Defendants, the *Birmingham and Midland Land and Investment Corporation*, from the record. I am bound to say that I think this is a very valuable power, and one that may be of great advantage. What I have to consider is, whether this is a case in which the Court ought to exercise that power. The suit is instituted to restrain the sale of property by *Fallows*, a mortgagee, who, in another suit of *Callow* v. *Fallows*, has been authorized to sell and receive the purchase-money. As I collect, the present Plaintiff, *Vallance*, applied to be made a party to that suit as a Defendant, on the ground that he had an interest in the property, and he was so added as a Defendant. A motion was then made in that suit to restrain *Fallows* from receiving the purchase-money, and the result was that an order was made by consent that the sale to the *Birmingham and Midland Land and Investment Corporation* should be carried out and the purchase-money paid to *Fallows*, he undertaking to account for it. That was on the 16th of December last, and it is quite clear that *Vallance*, as a party to that suit, was bound by the consent order, and as between him and *Fallows* and the corporation the title of the corporation is absolute. It now turns out that *Vallance* had pre-

V.-C. M. 1876

VALLANCE v. BIRMINGHAM AND MIDLAND LAND AND INVESTMENT CORPORATION.

Judgment.

viously brought an action against *Fallows* to set aside the sale, but I think that by the order of the 16th of December he must be considered to have abandoned any claim as against the *Birmingham and Midland Land and Investment Corporation*. It appears to me, therefore, that a Defendant so improperly vexed as this Defendant company has a right to stop the litigation being proceeded with against them as early as possible. Rule 13 says that the Court or a Judge may at any stage of the proceedings order that the name of any party, whether as Plaintiff or Defendant, improperly joined be struck out; and by Rule 14 an application of this nature may be made at any time before trial by motion or summons, or at the trial of the action in a summary manner. The Court, therefore, clearly has the power at this stage of the proceedings to strike out from or add parties to the record, and I am asked to exercise that power by striking out the names of the Defendant corporation. Before this Act passed the Court frequently did the same thing at the hearing when it saw that a grievous hardship was done to any person by his name being retained on the record. The Legislature, by the *Judicature Act*, has now armed the Court with that power at any stage of the proceedings, and in my opinion it is a most beneficial power, and if I find a person improperly made a party to an action I shall at any time strike his name out of the record. Now, considering that the order of the 16th of December is as against these Defendants perfectly good, and that *Vallance* has bound himself by it, I am clearly of opinion that these Defendants must be struck out of the record.

Then comes the question, upon what terms is the order to be made, and I think, as the Defendants did not apply to be dismissed at the first possible moment, the justice of the case will be not to give any costs.

I hope this case will be allowed to form a precedent for the application of this very useful order of Court as often as it shall be found applicable.

Solicitors for Plaintiff: *Innes & Sons.*

Solicitors for Defendants: *Emmet & Son.*

Solicitors for *Fallows: Nash, Field, & Mathews.*

In re BRADFORD TRAMWAYS COMPANY.

V.-C. M.
1876
March 17.

Company—Payment out of Deposit—Insolvency and Winding-up—Application of Deposit.

Where by an Act of Parliament the payment out of the Government deposit paid in by a company, is left to the discretion of the Court upon "the insolvency and winding-up" of the company, it is sufficient that the company is wound up on the ground of insolvency; and where the deposit is ordered to be paid out for the benefit of creditors, the first assets available for debts will be the calls already made, and then the deposit money, but only so much thereof as may be necessary, the rest being forfeited to the Crown.

Reversed on appeal 4 Ch. D. 18 C.A.

Statement.

THIS was a petition presented by the official liquidators in the winding-up of the *Bradford Tramways Company*, praying that a sum of £3249 17*s.* 2*d.* £3 per Cent. Annuities, which had been paid into Court by way of deposit upon the formation of the company, should be paid out to the Petitioners. The company was incorporated by a special Act, 36 & 37 Vict. c. 253, authorizing the construction of street tramways in *Bradford*. The Act received the Royal Assent on the 5th of August, 1873.

It was provided that the capital of the company should be £110,000, and in pursuance of the Standing Orders of the Houses of Parliament a sum of £4200, being £5 per cent. upon the estimate in respect of the tramways originally proposed to be authorized, was deposited with the Paymaster-General of the Court of Chancery by the promoters of the company. That sum of £4200 was afterwards reduced to £3000, upon its appearing that only a portion of the undertaking would be carried out, for which a sum of £60,000 only would be required, and that sum was invested in £3249 17*s.* 2*d.* £3 per Cent. Annuities.

The 18th section of the Act provided as follows:—"The said sum of £3000 deposited as aforesaid shall be applicable and, after due notice in the *London Gazette*, shall be applied towards compensating any landowners or other persons whose property may have been interfered with or otherwise rendered less valuable by the commencement, construction, or abandonment of the tramway, or any portion thereof, and for which no compensation or

V.-C. M. 1876 *In re* Bradford Tramways Company. Statement.

inadequate compensation shall have been paid, and also in compensating all road authorities for the expense incurred by them in taking up any tramway or materials connected therewith, placed by the company in or on any road vested in or maintainable by such road authorities respectively, and in making good all damage caused to such roads by the construction or abandonment of such tramway, and shall be distributed in satisfaction of such compensation as aforesaid, in such manner and in such proportions as to the Court of Chancery in *England* may seem fit, and if no compensation shall be payable, or if a portion of the said sum of three thousand pounds shall have been found sufficient to satisfy all just claims in respect of such compensation, then the said sum of three thousand pounds, or such portion thereof as may not be required as aforesaid, shall either be forfeited to Her Majesty, and accordingly be paid to or for the account of Her Majesty's Exchequer, in such manner as the Court of Chancery in *England* thinks fit to order on the application of the solicitor of Her Majesty's Treasury, and shall be carried to and form part of the Consolidated Fund of the *United Kingdom;* or, in the discretion of the Court, if the company is insolvent, and has been ordered to be wound up, or a receiver has been appointed, shall wholly or in part be paid to such receiver, or to the liquidator or liquidators of the company, or be otherwise applied as part of the assets of the company for the benefit of the creditors thereof." The works connected with the tramways authorized to be constructed by the Act were never commenced, in consequence of a small proportion only of the capital of the company being subscribed, and the amount so subscribed being wholly insufficient to complete the undertaking. An order was obtained on the 5th of June, 1875, for winding up the company, on the ground of insolvency, and official liquidators were appointed.

No claim for compensation in respect of any of the matters referred to in sect. 18 of the *Companies Act* had been made by any landowner or road authority in the winding-up, and inasmuch as the works authorized were never commenced, no such claim could arise.

The company was insolvent, and the Petitioners were desirous that the said sum of £3249 17*s.* 2*d.* £3 per Cent. Annuities should

be transferred to them to be applied as part of the assets of the company for the benefit of the creditors, in accordance with sect. 18 of the Act.

A question now arose whether the Court had power to authorize this money to be paid out to the liquidators, or whether it was not forfeited to the Crown. There was another question raised as to whether the money ought not to be paid to the *Midland Banking Company*, by whom the deposit-money had been advanced and lent to this company, and who claimed to have a charge upon it in respect of such advance.

Statement.

The latter question was postponed until the Court should have decided the right of the Crown to the deposit.

Higgins, Q.C., and *Bradford*, for the official liquidators:—

Argument.

We now ask that the deposit-money may be paid to the liquidators to be applied as part of the assets of the company. The principle upon which a deposit is ordered to be paid into Court is that there may be a fund to answer the debts and liabilities of the company in case of failure. This company was wound up on the ground of insolvency, and this brings it within the discretion of the Court to order the money to be applied for the benefit of the creditors. The deposit is the primary fund for payment of the debts. The debts are said to amount to £4000, and there is nothing but the deposit fund for them to rely upon, unless there is to be a call made upon the contributories for a portion of the capital, but no such call ought to be made. This Act provides, by the 18th section, that the application of the deposit shall be "in the discretion of the Court if the company is insolvent and has been ordered to be wound up, or a receiver has been appointed." These words differ from the words of the 26th rule of the Board of Trade Orders, which provides that "where the company does not commence business within the prescribed period the deposit shall, after providing for expenses and compensation, be either forfeited to Her Majesty, or in the discretion of the Court, if the promoters are a company, and such company is insolvent or has been ordered to be wound up, or a receiver appointed, shall be wholly or in part paid or transferred to such receiver, or to the liquidator, or be

V.-C. M. 1876 — *In re* BRADFORD TRAMWAYS COMPANY. — Argument.

otherwise applied as part of the assets of the company for the benefit of the creditors thereof." The difference only consists in the word "and" being used for "or," if it were not for that variation this case would come within the authority of *In re London and County Tramways Company* (before Vice-Chancellor *Hall*, Feb. 26, 1875), in which the question arose under the 26th rule of the Board of Trade Orders.

J. Pearson, Q.C., and *Charles McLaren*, appeared for the *Midland Banking Company*, and upon this point were in the same interest as the liquidators.

Rigby, for the Crown:—

The words in the special Act under which this company is incorporated are that the Court shall have discretion, "if the company is insolvent and has been ordered to be wound up." The two things must therefore occur—the insolvency and the winding-up. It is true that the petition states the company to be insolvent, but there is no proof of that. A company cannot be insolvent while it has unpaid capital which can be called up. If the unpaid capital were called up, the whole debts of the company would be paid without the deposit being required, and it is, therefore, under the first part of the 18th section, forfeited to the Crown, and the Court cannot exercise any discretion in the matter. The question is the amount of insolvency; and if, after calling up the capital, any debts should remain unsatisfied, then the deposit to the extent only of so much as would be required for the remainder of the debts might, in the discretion of the Court, be paid to the liquidators. This is clear from the words of the section, which are that in the discretion of the Court the money "shall wholly or in part be paid to the receiver or liquidator," by which it was evidently contemplated that the whole of the money might not be required for payment of the debts. Therefore so much as is not wanted for the creditors should go to the Crown; and in the case of *In re London and County Tramways Company*, Vice-Chancellor *Hall* required that an affidavit should be produced shewing the amount required for payment of debts.

MALINS, V.C.:—

The first question is in what sense the company is to be deemed insolvent. I consider that insolvency here means whenever a company has been ordered to be wound up upon the ground of insolvency—that is, its inability to pay its debts, or unreadiness to pay its debts—then it comes within the discretion of the Court "if the company is insolvent *and* has been ordered to be wound up." In that case the deposit is to be "wholly or in part paid to such receiver or liquidator." If there are £3000 here, and £1000 will pay its debts, then I say it would be part only. It has been said that if they call up the whole of their capital they will have £6000 to pay £4000 of debts, but that is not what I intend. I mean this, that the calls made before the date of the winding-up are to be paid in full, and these will be considered as assets of the company, as far as they are recoverable, but no further calls are to be made for the purpose of paying the debts until the £3000, which is the amount of the deposit, is exhausted. Then, if you take all the assets of the company, including the calls made before the winding-up, and those are not sufficient to pay the debts, you resort to the deposit so far as is necessary, but no further.

There is another question that I have some doubt about. I am not quite certain that this section ought not to be read thus, "or in the discretion of the Court, if the company is insolvent and has been ordered to be wound up, or a receiver has been appointed"—whether that ought not to be read disjunctively thus, "or in the discretion of the Court if the company is insolvent, *or* has been ordered to be wound up, or a receiver has been appointed." I am rather inclined to think it should be read disjunctively, and therefore an order to wind up is sufficient, or the appointment of a receiver is sufficient.

There still remains the question as to "wholly or in part." That, I think, means only so much as is necessary. It seems to me that I can only take away from the Crown what may be requisite for payment of the debts; and upon that subject I ought to have an inquiry, in order that I may be satisfied that the whole amount of deposit is required to pay the creditors.

[*Rigby*:—If a certificate is made by the liquidator as to the

V.-C. M. 1876 *In re* BRADFORD TRAMWAYS COMPANY. Judgment.

amount of the assets and the debts, the Crown will be satisfied without further inquiry.]

Then the order will be, the Court being of opinion that the company is to be deemed insolvent within the meaning of the 18th section when it was ordered to be wound up upon the ground of insolvency within the *Companies Act*, and that the deposit is liable for payment of debts, including the costs of winding up, in priority to any moneys received from calls made or to be made subsequently to the winding-up; let the liquidator make an affidavit as to the debts and assets at the time of the winding-up, for the purpose of shewing how much is required.

Then, as to the question between the creditors, the further argument should stand over until the Easter sittings, in order to give the Crown an opportunity of appealing from my decision if it should think fit.

Solicitor for Official Liquidators: *Walter Webb.*
Solicitors for Creditors: *Ashurst, Morris, & Co.*
Solicitors for Crown: *Raven & Hare.*

V.-C. M. 1876 *March* 21.

REINER *v.* MARQUIS OF SALISBURY.

[1875 R. 130.]

Bill for Discovery—Claim to Property in India—Improper Tribunal—Demurrer.

The Plaintiff filed a bill of discovery to obtain inspection of documents in the Defendant's possession in *England*, in aid of proceedings about to be taken for the recovery of land in *India*:—

Held, that the property claimed being in *India*, and the Defendant being capable of being sued in *India*, an English Court was not the proper tribunal to decide upon the Plaintiff's claim, and a bill of discovery could not be maintained in aid of such a claim.

Statement.

THIS bill was filed in October, 1875, by *Aloysius Reiner*, of the Kingdom of *Bavaria*, farmer, against the Right Honourable the Marquis of *Salisbury*. It stated that *Johann Reiner* was born in 1726, and went to *India* in the year 1763, where he became possessed of considerable landed property, which he held in fee simple

under a grant or official document of gift from the lord of the province of *Goor Gaon*, known as the *Pergunnah*, on the western side of the *Jumna*, and a duplicate of this official grant was retained in the state offices of the Empire of *Delhi*. *Johann Reiner*, otherwise called *Sumroo*, died intestate in the year 1778, being then in possession of all his said estates, and having amassed considerable wealth. He left a widow, afterwards known as the Begum *Sumroo*, and an only son by a former marriage, whose name was *Louis Reiner*. At the death of his father, *Louis Reiner* entered as his heir upon the estate at the *Pergunnah*, and his possession was confirmed by the Emperor of *Delhi*, the then lord paramount of the land. The said *Louis Reiner* was a man of weak capacity, and very shortly after his father's death he was forcibly dispossessed of his property by his stepmother, the Begum *Sumroo*, and soon afterwards died intestate and without issue.

The Begum *Sumroo* held the property until the year 1803, when the *East India Company* having obtained the control of the peninsula of *Hindostan*, it was considered advisable, for the purpose of inducing her to maintain friendly relations with the English, to recognise her as the *de facto* owner of the property, and during the remainder of her life she continued under the countenance of the English authorities to exercise the same control over and enjoyment of the estate at the *Pergunnah* as she held at the beginning of this century.

During the lifetime of the Begum *Sumroo* she had adopted a child who had since been known as *David Ochterlony Dyce Sombre*, and she assumed to make a deed of gift, subject to her life interest, of the estate at *Pergunnah* to her adopted child, and by her will she confirmed the said deed. She died in the year 1836.

The *East India Company*, at the time of the death of the said Begum, seized on the estates at the *Pergunnah*, together with all other estates held by her which had previously belonged to her husband, and of which she had managed to obtain and retain possession.

The said *David Ochterlony Dyce Sombre* and his representatives took certain proceedings, first in the Indian Courts, and afterwards by appeal to the Privy Council, for the recovery of the lands so held by his mother by adoption, alleging that certain grants

V.-C. M. 1876 REINER v. MARQUIS OF SALISBURY. Statement.

thereof, or, at least, of those at the *Pergunnah*, had been made to her by certain sunnuds granted about the year 1790. These proceedings failed, the Judicial Committee having decided that the acts of the Indian Government were not the seizure by arbitrary power of territories which up to that time had belonged to another sovereign state, but were the resumption of lands previously held from the Government under a particular tenure upon the determination of that tenure.

At the death of the Begum *Sumroo* she had in her possession all the sunnuds, or official documents which had relation to the estate, and the grants and confirmation thereof to her husband, which she had taken possession of at his death, and she had a great number of letters and communications sent from the family of her husband to him, and also the sunnud confirming the estate to her husband's son, *Louis Reiner*, as well as other documents which belonged to him, but which she had taken from him.

At the death of the Begum, Mr. *Hamilton*, the then magistrate of the *Meerut* Division, and Mr. *Hutchinson*, the then commissioner of the *Meerut* Division, together with Mr. *Metcalfe*, the then commissioner of the *Delhi* estates, seized the whole of her papers, including all the documents so in her possession as aforesaid. They or their predecessors in office had previously seized and taken possession of all the papers in the state offices of the Emperor of *Delhi*, which included the duplicates of the sunnud originally granted to the said *Sumroo*, otherwise *Johann Reiner*.

The documents so taken possession of by the magistrates and commissioners of the *East India Company* were afterwards transferred by them to the archives of the company, and in the year 1858, when the governing powers of the company were vested in the Crown, the whole of such documents passed into the possession of the then Secretary of State for *India* in Council, and were now in the possession of the Defendant, who held the same office; that these documents were not state papers, but were simply documents which were in the first instance wrongfully taken possession of by the *East India Company*, and by mere transition had passed into the hands of the Defendant. The Defendant had also in his possession the duplicates of the several sunnuds which were originally taken possession of by right of conquest by the *East India Com-*

pany, but they were not connected with any matter of state policy, nor did they relate to the carrying on of the government of *India* or any other place.

The Plaintiff was about to commence proceedings against the Crown and the Defendant, (if he could obtain the requisite fiat) for the recovery of the estate at the *Pergunnah*, so taken possession of by the *East India Company*, and which was now held by the Crown. He would, however, be unable to prove his title to the estate except by an inspection and production of the said documents, which, when produced, would fully prove such title in all points except upon that of his being heir to *Johann Reiner*, upon which point the Plaintiff was able to bring forward conclusive evidence.

Statement.

The bill prayed that the Defendant might be ordered to make discovery by statement, under his hand or otherwise, in such manner as might be deemed meet of all documents in his possession in relation to the premises, and that the Plaintiff and his solicitor, with necessary assistants, might be at liberty to inspect and examine, and take copies of such documents, or, at any rate, of all documents taken possession of by the *East India Company* as aforesaid on the death of the Begum *Sumroo*, and now in the possession of the Defendant; and that on such examination he might be allowed to make use of such further assistance for deciphering and interpreting the documents as he might require.

The Defendant demurred.

Fitzjames Stephen, Q.C., and *Macnaghten*, in support of the demurrer:—

Argument.

The Plaintiff claims an estate in *India*, the title to which accrued, if at all, nearly a century ago; therefore it is a stale demand to which the Court is never willing to give any encouragement; and it is extraordinary that in all the proceedings taken by Mr. *Dyce Sombre* for the recovery of the estates of the late Begum *Sumroo* no mention was ever made of the claim of this Plaintiff.

There are several fatal objections to which this bill is obnoxious, and which are included in the rules laid down in Lord *Redesdale's* book (1):—

"I. That the case made by the bill is not such in which

(1) 4th Ed. p. 185.

V.-C. M. 1876 REINÉR v. MARQUIS OF SALISBURY. Argument.

a Court of Equity assumes a jurisdiction to compel a discovery; II. That the Plaintiff has no interest in the subject, or no interest which entitles him to call on the Defendant for a discovery; III. That the Defendant has no interest in the subject to entitle the Plaintiff to institute a suit against him even for the purpose of discovery; IV. Although both Plaintiff and Defendant may have an interest in the subject, yet that there is not that privity of title between them which gives the Plaintiff a right to the discovery required by his bill; V. That the discovery, if obtained, cannot be material; and VI. That the situation of the Defendant renders it improper for a Court of Equity to compel a discovery." This case comes within at least three of these objections, namely, the first, third, and fifth.

No petition of right can be presented in this country in respect of lands not in *England*. This is laid down on the broadest principles in *Re Holmes* (1). Therefore the Plaintiff proposes to proceed in a manner wholly impossible. The proper course for him to have adopted was to bring an action against the Secretary of State for *India*, and this should have been brought, not in *England*, but in *India*, where by the 65th section of the Act, 21 & 22 Vict. c. 106, the Secretary of State may be sued, and where relief may be given. But he cannot, under any circumstances, sue in this country for the recovery of land in a foreign country or in the colonies. This was stated most explicitly in *Doss* v. *Secretary of State for India* (2).

Then if the Plaintiff cannot obtain relief upon his bill, neither can he file a bill of discovery in support of that relief which he would not be entitled to. And to make the case worse, he asks relief against the wrong Defendant, because the Marquis of *Salisbury* cannot be sued personally, but only in his official character of Secretary of State for *India*.

Locock Webb, Q.C., *E. C. Willis*, and *Glenn*, in support of the bill:—

The answer to the argument that this is a stale demand is that the *Statute of Limitations* has no application to cases in which the Crown is concerned: *Rustomgee* v. *The Queen* (3).

Next, as to the right of the Plaintiff to sue. This land became

(1) 2 J. & H. 527. (2) Law Rep. 19 Eq. 509. (3) 24 W. R. 428.

8 Jan 1876

vested in the Crown as trustee for the benefit of those persons who could shew a title to it; and upon the allegations in this bill there is a clear right in the Plaintiff, as the direct legal heir of the person to whom the land was granted by the then governing power in the country; and the land having passed into the possession of the *East India Company*, and then of the Queen, it is perfectly clear that the Plaintiff can only have redress as against the Defendant who is the proper person to be sued by virtue of the *Indian Government Act*.

[MALINS, V.C.:—You need not go into the question as to the Defendant not being sued in his official capacity as Secretary of State for *India*, because that can be corrected by amendment, and in that respect it will be better to take the bill as amended in order to have a decree upon the merits.]

We admit that unless the Plaintiff can shew a right to the estate he cannot have discovery as incident to the right, but the right, according to the allegations in this bill, is perfectly clear.

Then as to the right to sue in this country for land in *India*. This is not a bill for the recovery of land, but for discovery only, in aid of proceedings which will be taken. It is different from the case of *Doss* v. *Secretary of State for India* (1), because the documents we require are in *England*, and not in *India*. They are preserved in the archives of the *East India House*, and we do not, therefore, sue to recover land in *India*, but to obtain inspection of documents without which we cannot recover the land.

Our course of proceeding is by petition of right, and not by action; and according to the case of *Thomas* v. *The Queen* (2), we cannot obtain discovery in aid of a petition of right under the *Petition of Rights Act* (23 & 24 Vict. c. 34) and the *Common Law Procedure Act*. It is quite true that under the *Government of India Act* (21 & 22 Vict. c. 106) the Secretary of State for *India* may be sued in *India* as well as in *England*, but the proceedings may be taken either in *England* or in *India*, and since the documents we ask for are in *England*, it is the most convenient course to apply for them where they are. If we proceeded in *India* for

(1) Law Rep. 19 Eq. 509. (2) Law Rep. 10 Q. B. 44.

V.-C. M. 1876 REINER v. MARQUIS OF SALISBURY.

Argument.

this purpose, we could only go there to get an order to see the documents, and that order must be acted upon in this country.

This is strictly a bill of discovery in aid of proceedings about to be instituted, and we have the authority of *Ellice* v. *Roupell* (1) to shew that this is our right course.

Upon a mere bill of discovery filed in aid of other proceedings the Court cannot, except in the clearest case, decide upon the legal rights of the party asking for discovery: *Thomas* v. *Tyler* (2); therefore any arguments as to the right of this Plaintiff to recover would be useless so long as we shew a *primâ facie* case, which we submit has been done upon this bill.

Judgment.

MALINS, V.C.:—

This is a bill for discovery in aid of certain proceedings which the Plaintiff is about to take for the recovery of estates of great value in *India*. The title of the Plaintiff accrued in 1778, that is, ninety-eight years ago. Upon a bill for discovery no relief can be given unless that relief is useful for the purpose of obtaining something as to which the Plaintiff has a reasonable chance of

The principle upon which the Court acts is laid down in which *Mitfordale* (3), "Where the bill is a bill of discovery necessary for the Plaintiff to shew by his bill a case mere purpose of Equity will assume a jurisdiction for the exercised to assist pelling a discovery. This jurisdiction is tion or defence or administration of justice in the prosecu- in some other Court other suit either in the Court itself or a discovery to aid there the object of a bill is to obtain Court itself, as the Court ecution or defence of a suit in the state the suit depending already jurisdiction of the subject, to upon the bill of discovery ficient to give the Court jurisdiction civil in a Court of ordinary. And in the case of suits merely pel the discovery required, isdiction, if that Court can itself com- Now what is the title Court of Equity will not interfere." right to sue in this country this Plaintiff to sue? He has no recover land situate in *India*. His

(1) 32 Beav. 308.

(2) 3 Y. & C. Ex. 255.

(3) Mitf. Pl. 330 4th Ed. pp. 185, 186.

right is to sue in *India*, as I pointed out in the case of *Doss* v. *Secretary of State for India* (1). I there decided that if a person had a claim to property in *India* the proper tribunal for the recovery of such property was in *India*, where there are Courts armed with every requisite power for granting relief. I then said that the subject-matter in dispute being in *India*, the Plaintiffs resident in *India*, and the Secretary of State being in *India* as well as in this country, all circumstances concurred in shewing that if the case could be sustained at all it was in the Indian Courts and not in the Courts of this country. That was a suit in which the Plaintiff claimed a debt, and if I was right in that case in holding that the Indian Courts were the proper tribunals, how much stronger is this case, where the claim is for land in *India?* It is not the practice to entertain suits in this country for the recovery of land in a foreign country. That was decided in *Re Holmes* (2). That was a petition of right in respect of land in *Canada*, and a demurrer was allowed on the ground that the Queen was as much resident in *Canada* as in this country, and that the suit ought to have been brought in *Canada*. I decided the case of *Blake* v. *Blake* (3) upon the same principle. There the suit was to recover land in *Ireland*. I held that the parties could not in this Court recover land in *Ireland*, and I allowed a plea which put the suit out of Court. I arrived at the same conclusion in *Matthaei* v. *Galitzin* (4), where a bill was filed to obtain a receiver in regard to property in *Russia*, and by allowing the demurrer that suit was put an end to. You cannot, in my opinion, maintain a suit in this country for the recovery of land in the colonies or a foreign country.

If, then, this bill is for discovery in aid of a suit which cannot be maintained in this Court, that is, if the Plaintiff does not shew a title to sue, he shews no title to discovery. That principle is clearly laid down by Lord *Redesdale*.

Mr. *Locock Webb* was under the impression that I had not decided this question in the case of *Doss* v. *Secretary of State for India;* but, in truth, I went further than his argument, for I decided that this was not the Court in which the suit could be

(1) Law Rep. 19 Eq. 509.
(2) 2 J. & H. 527.
(3) 18 W. R. 944.
(4) Law Rep. 18 Eq. 340.

V.-C. M. 1876 REINER v. MARQUIS OF SALISBURY. Judgment.

brought. At the same time that the Crown took possession of *India*, the Government provided also for the establishment of tribunals to decide any questions of law or of equity that could arise. There the Courts are armed with legal and equitable jurisdiction with regard to discovery, and every other doctrine inherent in the Courts of this country.

The proper course would have been for the Plaintiff to institute a suit in *India*, and he would have had the same right to discovery there that he would here. To suppose for one moment that the Crown can be sued in this country to recover land in *India* is a doctrine which is quite unsustainable.

Then with regard to the Plaintiff's right to discovery, I may refer to *Thomas* v. *The Queen* (1), which decided that the suppliant had no power to obtain discovery of documents in aid of a petition of right under the *Petition of Rights Act*, 1860 (23 & 24 Vict. c. 34, s. 7), and the *Common Law Procedure Act*, 1854 (17 & 18 Vict. c. 125, s. 50). In such proceedings he can have no discovery.

I have treated this case as if it were a bill against the Secretary of State for *India*, in order that it might not be decided on a mere technical objection. The demurrer will therefore be allowed.

Solicitor for Plaintiff: *C. M. Elborough*, agent for *E. Zimmermann*.

Solicitors for Defendant: *Lawford & Waterhouse*.

(1) Law Rep. 10 Q. B. 44.

WHITE *v.* COX.

V.-C. B.

1876

March 10, 14.

[1874 W. 47.]

Marriage Settlement—Minority of Wife—Reversionary Interests of Wife—Confirmation by Widow, and by second Husband.

By an ante-nuptial settlement, it was witnessed that the intended husband and the intended wife (who was a minor) would, as soon after the marriage as the case would admit, convey to the trustees certain funds to which the intended wife was, contingently on her attaining twenty-one or marriage, entitled in reversion expectant on the death of her mother; and that the intended husband should bring certain property into settlement.

The husband died, leaving a son. After the husband's death, in a suit relating to part of the property agreed to be settled by him, in which the widow, as administratrix, was a defendant, a decree was made by consent of all parties by which part of the property was ordered to be paid to the trustees:—

Held, that this amounted to a confirmation by the widow of the settlement.

The widow married again; and during the second coverture the reversionary funds fell into possession, whereupon a petition was presented by the second husband and his wife, as they alleged, in ignorance of the effect of their so doing, praying that the wife's funds might be carried over to an account intituled the Account of the Settlement made on the first marriage; and upon the petition an order was made as prayed.

On suit by the second husband to have the settlement declared void against him and the children of the second marriage:—

Held, that the presentation of the petition, followed by the order of the Court, amounted to a confirmation by the second husband of the settlement, and bill dismissed, but without costs.

MOTION FOR DECREE.

Statement.

On the 6th of April, 1838, *Elizabeth Shum*, then a widow, died, having by will, dated the 7th of September, 1836, bequeathed her residuary personal estate upon trust, as to one fourth, for her daughter *Harriet*, wife of *Thomas Clift*, for life, for her separate use, and on her death to her children who should attain twenty-one or marry.

In 1841 a suit was instituted in which *John Shum*, a brother of Mrs. *Clift*, and others, were Plaintiffs, and *George Hobbs* and another, the trustees of the will, were Defendants, for carrying into execution the trusts of the will. In this suit orders were

V.-C. B. 1876 WHITE v. COX. Statement.

made, under which one-fourth part of the residue of the testatrix's estate, consisting of the sums of £1540 12*s.* 10*d.* and £3800 Bank Annuities, was carried over to an account intituled the account of *Harriet Clift* and the parties interested in her share of the residue, and the dividends were ordered to be paid to *Harriet Clift* upon her separate receipt for life, or until further order.

In 1843 *Henrietta Augusta*, one of the daughters of Mrs. *Clift*, then a minor, was married to *Abraham Cox*. At that time her property consisted of her contingent reversionary interest (which would become vested on her attaining twenty-one) in the above funds in *Shum* v. *Hobbs;* a contingent interest (which would become vested on her attaining twenty-one or marriage) in a sum of £1333 6*s.* 8*d.* Consols, then standing in the name of *John Michael Shum;* and an estate in tail general, in remainder expectant on the death of *Harriet Clift*, in one-fifth of freeholds demised by the will of her grandfather.

At the same date *Abraham Cox* was entitled to certain freehold hereditaments, subject to a mortgage of £200.

By an indenture of settlement dated the 31st of July, 1843, made shortly before the marriage, between *Abraham Cox* of the first part, *Henrietta Augusta Clift* of the second part, *Thomas* and *Harriet Clift* of the third part, and the trustees of the fourth part, it was witnessed that *A. Cox* and *H. A. Clift*, their heirs, executors, administrators, and assigns, would, as soon after the marriage as the case would admit, at the cost of *Cox*, convey and assure the fee simple of *H. A. Clift* in the hereditaments, and assign her share in the three sums of stock, to the trustees, and that *Cox* would within six months after the marriage convey his freehold messuage and premises, free from the mortgage debt and all other incumbrances, to the trustees. The trusts were, after the fund had been transferred into the names of the settlement trustees, during the life of *Henrietta A. Clift*, to pay the income to her appointees or to her for her separate use without power of anticipation; and after her decease, upon trust to permit *Abraham Cox* to receive the income for his life; and after the decease of the survivor to pay, assign, and transfer the fund unto and between all and every the children and child of the marriage, in equal shares if more than one, to be transferred and assigned on their, his, or her attaining

twenty-one or marriage. By the same deed *Abraham Cox* covenanted to insure his life and to assign the policy to the trustees and pay the premiums, and it was declared that the policy moneys should be applied in satisfaction of the mortgage debt on his real estate, and the residue paid to the executors, administrators, and assigns of *Cox*. The deed also contained a covenant by *Cox* to assure after-acquired property of *Henrietta A. Clift*.

By a deed dated the 14th of August, 1846, a policy for £500, dated the 29th of August, 1843, which *Abraham Cox* had effected on his life, was assigned to the trustees in pursuance of the covenant.

Abraham Cox died on the 23rd of August, 1846, in the lifetime of *Harriet Clift*, intestate, leaving his widow *Henrietta A. Cox*, who became his administratrix, and two children, *Arnold George Cox* and a daughter, surviving, of whom the daughter died in infancy.

On the death of *Abraham Cox*, conflicting claims were made on the policy moneys, and on the 10th of November, 1847, a bill was filed by *William Shaw*, the manager of the insurance company, against *Henrietta A. Cox*, widow, the trustees of the settlement, and *Robert Nichols*, a trustee of a creditors' deed executed by *Abraham Cox*, to have the rights of the parties in the policy moneys determined. In that suit Mrs. *Cox* answered on the 13th of January, 1848, and thereby stated that by the settlement of the 31st of July, 1843, *Abraham Cox* covenanted with the trustees that he would effect in his own name a policy payable on his death, and would forthwith assign the same to the trustees "upon the trusts in the said indenture mentioned of and concerning the same." She admitted that, as such administratrix as aforesaid, she had commenced an action against the manager of the company for the sum of £493 6*s*. 3*d*. due upon the policy; that she and the other Defendants in that suit did make conflicting claims to the policy moneys; that the trustees of the settlement had "consented" to her, as such administratrix, receiving the policy moneys; and that she intended to proceed with the action. She also stated that the policy was in the possession or custody of the trustees of the settlement "as such trustees as aforesaid."

By a decree in *Shaw* v. *Cox*, dated the 28th of June, 1848, it was ordered that out of the sum of £517 19*s*. 7*d*. cash, being the

V.-C. B. 1876 WHITE v. COX. Statement.

proceeds of the policy moneys, then standing in the bank to the credit of the cause, costs should be paid; and that, "by consent of the several Defendants," out of the residue, certain sums, making together £328 7*s.* 6*d.*, be paid to the Defendants, the trustees of the settlement, upon the trusts thereof; or that, if insufficient for the purpose, the whole of the residue be paid to the trustees of the said settlement in part satisfaction thereof; and that out of the residue, if sufficient, the sum of £20, or, if insufficient, the whole of the residue, should be paid to the Defendant Mrs. *Cox*, for or towards the expenses of the funeral of the intestate, *Abraham Cox*; and that if any residue should remain, it should be paid to the Defendant *Nichols*, for the benefit of the creditors of *Abraham Cox*.

On the 20th of November, 1853, Mrs. *Cox* married *William White*, and of her second marriage there were seven children, all infants.

In or about the year 1866, Mr. *White* called the attention of *Thomas Clift*, Mrs. *White's* father, who was one of the trustees, to the subject of the settlement. Mr. *Clift* consulted Mr. *Thomas John Coward*, acting as solicitor for the family, who said that "nothing could be done to alter it."

On the 18th of December, 1871, *Harriet Clift* died, whereupon Mrs. *White's* reversionary interests fell into possession.

On the 1st of March, 1872, a petition, in which Mr. and Mrs. *White* and others were petitioners, was presented in the suit of *Shum* v. *Hobbs*, and on the 27th of March, 1872, an order was made on the petition as prayed, that, after sale of sufficient part of the fund, and payment of the costs, one-fifth of the residue of the £1540 12*s.* 2*d.* Bank Annuities, and one-fifth of the £3800 Bank Annuities, should be carried over to the credit of the cause, "The Settlement Account made on the marriage of *Abraham Cox* and *Henrietta Augusta* his wife, and their children;" and that the income during the life of Mrs. *White* should be paid to her for her separate use until further order. Pursuant to the order, the two sums were carried over accordingly; but it was in evidence that up to March, 1875, Mrs. *White* never received or applied for any dividends under the order.

The bill was filed on the 3rd of March, 1874, by Mr. and Mrs. *White* against *Arnold George Cox* and *Thomas Clift*.

Plaintiffs alleged that Mr. *Coward* did not explain or let the Plaintiffs know that the petition, or the order made thereon, "were to be so framed as to operate as a confirmation of" the settlement; that they never gave Mr. *Coward* instructions for, or authorized any petition which would have that effect, and never knew of the order "till afterwards," and never acquiesced therein. They also denied that the Court decided on the validity of the indenture on the occasion of the hearing of the petition. They said that *William White* was willing to settle the whole of the property as the Court should think proper.

The bill prayed for a declaration that the settlement of the 31st of July, 1843, did not affect the sums of stock standing to the credit of *Shum* v. *Hobbs*, the account above mentioned, or the proceeds of sale of the hereditaments; for a declaration that upon the execution of such a settlement as the Court might approve, the funds and proceeds of sale ought to be transferred as to the part so to be settled to the sureties of such settlement, and as to the residue, if any, to the Plaintiff *William White;* that so far as proper and necessary the present suit might be taken as supplemental to *Shum* v. *Hobbs*, and that the order of the 27th of March, 1872, might, so far as was necessary to the relief now prayed, be reviewed and reversed, and the Plaintiffs put in the same position as they would have been in if the facts thereinbefore stated had been known to the Court when the order was obtained; and other relief.

The Defendant *Cox*, by his answer, stated the particulars of the suit of *Shaw* v. *Cox*. He said that the petition in *Shum* v. *Hobbs* was presented with the full knowledge of the Plaintiffs; alleged that the Plaintiffs had "both of them confirmed" the settlement, both as to the Bank Annuities and as to the sale moneys, and claimed the benefit of the settlement.

Thomas Clift by his answer said, that the sum of about £248, being the residue of the policy moneys which had been paid into Court by the company, was, in August, 1848, "with the consent of the said *Henrietta Augusta White*, received from the Accountant-General's office by the said *Thomas Clift* the elder, as trustee of the said indenture of settlement of the 31st of July, 1843," and by him applied towards paying off the mortgage; also that the real estate

V.-C. B. 1876 WHITE v. COX. Statement.

settled by *Abraham Cox* was, in the year 1847, sold by *T. Clift* the elder for about £670, and that after the mortgage had been paid off, and after paying the expenses of the sale and other costs and charges to which the property was liable, there remained £400, which was invested in land upon the trusts of the settlement. After the death of *Thomas Clift* the elder, the property was sold by the Defendant *Thomas Clift*, then the sole trustee of the settlement, and out of the proceeds a sum of £400 was lent to the Plaintiff *William White*, on the security of a house and premises belonging to him.

The Plaintiff *White*, in an affidavit, said that he did not, for upwards of four years after his marriage, know of "the terms of" the settlement. About 1858 he discovered some memoranda, which led him to consult Mr. *Thomas Clift*, senior.

The co-Plaintiff, Mrs. *White*, made an affidavit for the Defendants. She said, "I have always considered that I have elected to take the interests secured to me under the said settlement, and I say I now elect to take thereunder, and to leave the value of the properties and moneys secured thereby to my son *Arnold George Cox*."

Mr. *Coward*, in his affidavit, deposed:—"On the hearing of the said petition" (*i.e.*, the petition in *Shum* v. *Hobbs*), "the trustee of the funds in Court in the suit of *Shum* v. *Hobbs* appeared thereon by her counsel, and raised the question as to the validity of the settlement of the 31st of July, 1843, on the ground, among others, that the Plaintiff, *Henrietta A. White*, was a minor at the time of the execution thereof, and I say that after some discussion the order was made on the said petition."

On the 25th of May, 1875, the Plaintiff Mrs. *White*, went to the Paymaster-General's office, and there received her dividends.

Argument.

Kay, Q.C., and *W. P. Beale*, for the Plaintiff *William White*:—

The settlement having been executed by Miss *Clift* whilst she was a minor, was originally voidable, and it was never confirmed by her whilst she was discovert and able to confirm it. Hence it is void against the second husband, who claims the fund by virtue of his marital right.

In *Codrington* v. *Lindsay* (1) a reversionary fund of the wife, settled whilst she was a minor, fell into possession after she had been divorced from her husband; and she, being *sui juris*, was held bound to elect. That is not this case.

It will be attempted to be argued that the Plaintiffs, by presenting the petition in *Shum* v. *Hobbs*, elected to take under the settlement. But "election by conduct must be by a person who has positive information as to his rights;" *Wilson* v. *Thornbury* (2), and in this case Mr. *Coward*, the family solicitor, does not say he gave, and did not give, either to Mrs. *Cox* whilst she was a widow, or to her or her present husband, Mr. *White*, since the second marriage, any intimation of what their respective rights were. So that the first step towards establishing a case of election fails entirely: *Wake* v. *Wake* (3); *Reynard* v. *Spence* (4); *Sopwith* v. *Maughan* (5); and other cases cited in *Streatfield* v. *Streatfield* (6).

Since the second marriage, election either by wife or husband is equally impossible, and nothing has been done by way of acquiescence in the order made on the petition, until after the filing of the bill, when Mrs. *White* in May last took the extraordinary step of going to the Paymaster-General's office, and taking her dividends.

Sir *H. Jackson*, Q.C., and *Berkeley*, for the Defendant *Arnold Joseph Cox*:—

No case of election by conduct could have arisen here. Election can only arise when there are two things to choose between. Mrs. *Cox*, whilst she was a widow, never was in a position to choose between two irreconcileable interests. She had a reversionary fund; it was in settlement, and she never repudiated or disturbed the settlement; that is all.

Then, after the marriage there came the most solemn adoption and confirmation of the settlement possible; namely, the presentation of the petition, and the order which is on the record of the Court.

(1) Law Rep. 8 Ch. 578.
(2) Ibid. 10 Ch. 239, 248.
(3) 3 Bro. C. C. 255; 1 Ves. 335.
(4) 4 Beav. 103.
(5) 30 Ibid. 235.
(6) 1 Wh. & T. L. C. 3rd Ed. 303.

V.-C. B. 1876 WHITE v. COX. Argument.

The case is exactly governed by *Ashton* v. *M'Dougall* (1). There, as here, the reversionary funds of a female minor were settled; the wife survived her husband and married again; and during the second coverture part of the funds fell into possession and were transferred to the trustees. The Court held that although the deed was not binding in respect of the reversionary interests against the surviving wife, she might, whilst discovert, have adopted it for her benefit; that, not having during her discoverture called for a transfer of the fund, she must be deemed to have acquiesced in and adopted it; and, finally, that the second husband was bound by the settlement.

In *Davies* v. *Davies* (2), where the surviving wife, after having directed part of the funds to be paid to the settlement trustees, became a lunatic, it was held that she must be taken to have confirmed the settlement.

Kay, in reply.

Judgment.

BACON, V.C.:—

This is a very hard case, no doubt; but the hardship has arisen from events which have occurred since the execution of the settlement. That the settlement was originally voidable is plain upon reading it. That it was in the power of this lady to have the settlement rectified so far as that it should protect her interests in the event of her second marriage, is clear.

But there came to be an occasion on which the rights of the parties under the settlement became the subject of judicial decision. In dealing with this case, I cannot overlook the proceedings in the suit of *Shaw* v. *Cox*, which have been referred to. They are not, strictly speaking, in evidence, and if it should be desired that the informality of this part of the evidence should be cured, I would allow the matter to stand over, in order to permit the proceedings in *Shaw* v. *Cox* to be verified. But assuming what is stated to have taken place in that suit to be strictly in evidence, I think the point upon which the defendants rely was in that suit fairly raised and determined. It was an interpleader suit, as has been said;

(1) 5 Beav. 56. (2) Law Rep. 9 Eq. 468.

the widow was a party—the trustees of the settlement, the assignee of the husband's creditors, and the legal personal representative of his estate were all parties. In her answer in that suit, the widow states her claim very distinctly. Adopting, as far as it was necessary to do so, the terms of the settlement, admitting the existence of the settlement, and disputing the creditors' deed, she says that the trustees of the settlement "have consented to my receiving, as such administratrix, the policy moneys;" and she says a variety of other things which admit the existence and binding nature of the settlement. Then, when the position of the widow, the claims of the creditors, the rights of the trustees, and of all the parties interested are before the Court, a decree is made "by consent," that is to say, with the consent, amongst others, of the widow. Whether the decree of the Court was judicial, or by consent, appears to me to be wholly immaterial, because the widow was unquestionably at that time able to consent. She did however consent, and the decree proceeded upon that consent.

It has been argued that there is no evidence of the widow having been at the time aware that the effect of her consent would be to confirm the settlement—that there is no evidence of her having acted under competent advice. But this question of whether she acted under advice or not, I think I have not now to consider.

Asserting by her answer her right to sue the assurance company as administratrix, claiming the policy moneys in that character, she surrenders her rights, and consents that the trustees of the settlement shall take the moneys in part payment of the premiums which they had paid on the policy. I think that if there can be confirmation of a settlement by acts, there has been confirmation of this settlement in this instance.

Then it is said there was not full confirmation, because the widow did not re-execute the deed. But full confirmation only means sufficient confirmation, and if the confirmation be sufficient, it cannot be said it was not full enough because she did not formally confirm the deed.

As to the knowledge of the widow at the time, the statements in the answer convince me that she perfectly knew at the time what her rights really were.

V.-C. B. 1876 WHITE v. COX. Judgment.

If the proceedings in the suit of *Shaw* v. *Cox* had been the only act of confirmation it appears to me that they would have been sufficient. But a petition was afterwards presented in the suit of *Shum* v. *Hobbs*. This the bill says was presented without the knowledge and consent of the Plaintiffs. The order directs that, after payment of costs, one-fifth of the residue of the two sums of stock shall be carried over to the credit of the cause to an account entitled, "The Settlement Account made on the marriage of *Abraham Cox* and *Henrietta Augusta*, his wife, and their children." Now, this proceeding raises that which really is the only question in the cause—the question whether the settlement has not been confirmed by the subsequent acts of the Plaintiff, the husband.

In the case of *Ashton* v. *M'Dougall* (1), which has been referred to, the decision of the Court was against the husband's claim, because the wife had by her conduct confirmed a settlement which at first was voidable by her. If the voidable settlement had been rejected by the wife, the Court could not, however unreasonable the claim of the husband might have been, have resisted it; the basis of the decision was that the confirmation by the widow had been so effected as that no concealment or misrepresentation could be imputed to her, and hence that the second husband was not entitled to relief.

In *Davies* v. *Davies* (2) the Court proceeded on the fact that there had been a partial confirmation—a confirmation *pro tanto*. There remained a question whether the widow could claim against the settlement as to the rest of the fund; and the Court decided that the widow, by directing part of the proceeds, which had fallen into possession, to be paid to the trustees, had confirmed the whole settlement.

As to what are called the negotiations that took place between the Plaintiffs and the Defendant, they are, in my opinion, wholly unimportant. That the Plaintiff, the second husband, should complain of the settlement is not unreasonable. It is very unreasonable, in the events that have happened, that, by a settlement executed during minority, the intention being to provide for a woman's

(1) 5 Beav. 56. (2) Law Rep. 9 Eq. 468.

children, she, marrying again and having several children who expect to be provided for, should find she is deprived of all means of making provision for them. I cannot help this; I am very sorry for it; but I think the conduct of the parties has been wholly without blame as respects everybody. Being compelled, then, as I am, to dismiss the bill, I think it would be unreasonable if I were to dismiss it with costs. The bill will be dismissed, but without costs.

Kay asked that the evidence as to the proceedings in the suit of *Shaw* v. *Cox* might be regularly proved.

Berkeley asked what the Court would think necessary.

BACON, V.C., said there must be an affidavit formally proving the bill, answer, and decree in *Shaw* v. *Cox*, and the affidavit should go to the identity of the first Defendant in that suit with the female Plaintiff in this.

There would be leave to the Plaintiff to answer the affidavit, and the order would not be drawn up till that evidence had been given.

Solicitors for Plaintiffs: *Cowdell, Grundy, & Browne.*
Solicitor for Defendants: *T. J. Coward.*

V.-C. B.
1876
March 6, 7, 15.

RUSSELL *v.* ST. AUBYN.

[1873 R. 124.]

Satisfaction—Rule against Double Portions.

6 Ch D. 676.

A., upon the marriage, in 1851, of *B.*, one of his two daughters, covenanted with the trustees of her settlement to give her or her trustees by his will one moiety of all the real and personal estate to which he should be entitled at his death, subject to payment of debts and to such devises and bequests (not exceeding in the whole one-fourth of the said real and personal estate) as he might think fit to make. And the deed contained a covenant for the settlement of any property which should be so given on specified trusts.

By his will, made in 1864, *A.*, after giving an annuity and directing payment of his debts out of his personal estate, directed the trustees to stand possessed of one moiety of the proceeds of his real and residuary personal estate upon trust for *B.*, for her separate use for life, with remainder to her husband until bankruptcy or alienation, and remainder to her children as she should by deed or will appoint, and in default of appointment, to her children equally as tenants in common, with limitations over on the trusts of the other moiety which were in favour of *A.*'s other daughter *C.* and her children.

The limitations in the settlement of 1851 were not identical with those of the will; in particular, the husband took the first life interest, which was not made determinable upon bankruptcy or alienation, and the limitations to children were confined to the children of the marriage, and were subject to a joint power of appointment in husband and wife:—

Held, that the legal presumption that the covenant had been satisfied by the gift in the will was not rebutted by the difference of the limitations in the two instruments, having regard to the identity of the subject-matter; and that *B.* and the other persons interested must elect between the provisions covenanted to be made by the settlement and given by the will.

Statement.

UPON the marriage, in October, 1851, of *Geoffry St. Aubyn* and *Agnes*, daughter of *Peter Smith*, a settlement, dated the 21st of October, 1851, was executed, by which, in pursuance of an agreement therein recited, *Peter Smith*, for himself, his heirs, executors, and administrators, covenanted with the trustees therein named, their executors, administrators, and assigns, in case the said intended marriage should be solemnized, he would, by his will, devise and bequeath unto and to the use of his daughter, Mrs. *St. Aubyn*, her heirs, executors, and administrators absolutely, or in case of

her death in his lifetime, would in like manner devise and bequeath unto and to the use of the trustees of the settlement at the death of the covenantor (*P. Smith*), their executors or administrators, absolutely, one moiety or equal half part or share of and in all and singular the real and personal estate of or to which he or any person or persons in trust for him should be entitled at the time of his death, subject to payment out of such real and personal estate of his just debts, funeral and testamentary expenses, and all such devises or legacies not exceeding in the whole one-fourth part in value of the said real and personal estate as he might think fit to devise and bequeath. Mr. and Mrs. *St. Aubyn* also thereby jointly and severally covenanted that if the marriage should take place, and if at any time during the life of Mrs. *St. Aubyn* any real or personal estate whatsoever to which *Peter Smith*, or any person in trust for him, were or should become seised or entitled (being his absolute property) should, in pursuance of the above covenant, be devised or bequeathed to or in trust for Mrs. *St. Aubyn;* or in case any such real or personal estate should in the lifetime of *P. Smith*, or by reason of the death of *P. Smith* intestate, or from any cause, and in any other manner whatever, descend or devolve upon or become the property of Mrs. *St. Aubyn*, or Mr. *St. Aubyn* in her right, then and in that case and so often as the same should happen they (Mr. and Mrs. *St. Aubyn*) would, as soon as conveniently might be and at the expense of the said real and personal estate, execute, &c., all such acts, deeds, &c., and assurances in the law whatsoever as the trustees or trustee for the time being should advise or require for conveying all such real and personal estate to the trustees or trustee for the time being, according to the nature and quality thereof respectively. The trusts declared of the property which should be devised or bequeathed by the will of *Peter Smith* were, upon trust to pay the interest to the husband during his life; and after his death, in case Mrs. *St. Aubyn* should survive him, to her during the remainder of her life, and after the death of the survivor, in trust for all and every or such one or more exclusively of the others or other of the children or child of the marriage, with such provisions for maintenance and education, and with such restrictions and in such manner, as *Geoffry St. Aubyn* and *Agnes* his wife should during

V.-C. B.
1876
RUSSELL
v.
ST. AUBYN.
Statement.

their joint lives by any deed or deeds direct or appoint; and in default of such joint appointment, or so far as the same should be incomplete or should not extend, then as the survivor of Mr. and Mrs. *St. Aubyn* (and if Mrs. *St. Aubyn* should be the survivor, whether she should be covert or sole), by any deed or by his or her will in writing, or any codicil thereto, should from time to time direct or appoint, and in default of such appointment, and so far as the same if incomplete should not extend, upon trust for the children of the marriage equally as tenants in common, with a hotchpot clause and a gift over of the shares of children dying under twenty-one or marriage; and in the event of there being no child of Mrs. *St. Aubyn* who should attain twenty-one, or being a daughter should attain that age or marry, then upon the following trusts, viz.: If Mr. *St. Aubyn* should die in the lifetime of Mrs. *St. Aubyn*, then, after his death and such default or failure of issue, in trust for Mrs. *St. Aubyn*, her executors, administrators, and assigns, for her and their absolute use and benefit. But if Mr. *St. Aubyn* should survive Mrs. *St. Aubyn*, then, after his death and such default or failure of children as aforesaid, upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisoes, and declarations as the said Mrs. *St. Aubyn*, notwithstanding coverture, should by her last will and testament in writing, or any codicil thereto, from time to time direct or appoint, and in default of such direction or appointment, in trust for the person or persons who under the statutes for the distribution of the personal estate of intestates would at the death of Mrs. *St. Aubyn* have become entitled to her personal estate in case Mr. *St. Aubyn* had died in her lifetime, and she had died possessed thereof and intestate.

The marriage took place shortly afterwards, and there were five children, all living, of whom the eldest had attained twenty-one.

Peter Smith, by his will, dated the 15th of September, 1864, after giving an annuity of £40, payable out of his personal estate, and a specific bequest of chattels, and directing payment of his debts, funeral and testamentary expenses, out of his personal estate, gave his realty and residuary personal estate to the Plaintiffs upon trust to sell his real estate and convert into money his

residuary personal estate, and invest the proceeds, of which they were to stand possessed upon trust as to one moiety to pay the income to his daughter, Mrs. *St. Aubyn*, during her life for her separate use as an inalienable fund free from the control of her present or any future husband; and after her death, upon trust to pay the annual income to Mr. *St. Aubyn* during his life or until he should become bankrupt or insolvent, or compound with his creditors, or do or suffer any act which but for this provision would, by operation of law or otherwise, be a sale pledge, mortgage, or other prospective disposition of the income or any part thereof. After the death of Mr. *St. Aubyn* the same moiety of the said trust money and all accumulations of income thereon were to be assigned and transferred to the children or more remote issue of testator's daughter, Mrs. *St. Aubyn*, as she should by deed or will appoint, but so as not to give an absolute transmissible interest to any child or issue who being a male should not attain twenty-one, or being a female should not attain that age or marry—in default of such appointment to the children equally at twenty-one or marriage. And if there should be no such child or issue of Mrs. *St. Aubyn*, then in trust to stand possessed of the said moiety upon the trusts declared concerning the other moiety bequeathed in trust for his other daughter, Mrs. *Masset*, and her children and issue.

Statement.

Peter Smith died on the 20th of March, 1870, and the debts and legacies did not absorb one-fourth of his property.

The bill was filed by the trustees of Mr. *Smith's* will for the purpose of obtaining the decision of the Court on the question whether the bequest in the will in favour of Mrs. *St. Aubyn* and her husband and children or remoter issue was to be taken as a satisfaction either wholly or in part of the covenant on the part of Mr. *Smith* contained in Mrs. *St. Aubyn's* marriage settlement.

Badcock, for the Plaintiffs.

Argument.

Sir *H. Jackson*, Q.C., and *Smart*, for the trustees of Mrs. *St. Aubyn's* settlement:—

The limitations of the will and settlement with respect to the provision secured by the covenant, and the bequest of a share of

V.-C. B.
1876
RUSSELL
v.
ST. AUBYN.
Argument.

residue in favour of Mrs. *St. Aubyn* and her children, are so substantially different—especially having regard to the joint power of appointment given to husband and wife by the settlement as contrasted with a sole power of appointment in the wife by the will, and to the circumstance that under the settlement the husband takes the first life interest; and under the will the wife, with remainder to the husband until bankruptcy or alienation—as to prevent the application of the doctrine of presumption against double portions—more easily repelled where the settlement precedes the will than where the will precedes the settlement—and exclude the notion that the one could have been intended as a substitute for the other: *Chichester* v. *Coventry* (1); *McCarogher* v. *Whieldon* (2). Election arises when the testator has attempted to dispose of something that was not his own, and it is plainly inconsistent that the legatee should take under both instruments; but in this case there is no such inconsistency. The covenant does not exhaust the moiety of the residue, but secures to us three-eighths only, leaving the remaining five-eighths for the will to operate upon, and to a moiety of that five-eighths we are entitled in addition to the three-eighths under the covenant.

[They also referred to *Thynne* v. *Earl of Glengall* (3); *Weall* v. *Rice* (4).]

Kay, Q.C., and *Freeling*, for Mrs. *Masset* and her children:—

There is nothing in this case to repel the *primâ facie* presumption that the testator, in making a provision for Mrs. *St. Aubyn* by the settlement on her marriage, and afterwards making a provision for her by his will, did not intend her to have a double portion.

Where the settlement and the will relate to the same subject-matter, and are of the same nature, or there are, as in this case, but slight differences, the two instruments afford intrinsic evidence against a double provision: *Weall* v. *Rice*. As to the differences between the trusts in the will and in the settlement, the case is concluded by *Thynne* v. *Earl of Glengall*, where, notwithstanding a similar difference, it was held that the share of residue given

(1) Law Rep. 2 H. L. 71.
(2) Ibid. 3 Eq. 236.
(3) 2 H. L. C. 131.
(4) 2 Russ. & My. 251, 267.

by the will was in satisfaction of the sum secured by the testator's antecedent covenant upon his daughter's marriage, and that, it being found to be for the benefit of the daughters and children to take under the will, she was bound to elect so to take.

[They also cited *Hutchison* v. *Skelton* (1); *Streatfield* v. *Streatfield* (2), and cases there referred to.]

Sir *H. Jackson*, in reply.

March 15. BACON, V.C., after stating the question, continued :— Judgment.

The purport and effect of this covenant appear to be so clear and explicit as to admit of no doubt. To the extent of one-half, all his property—subject only to the payment of his debts and funeral expenses, and to the satisfaction of such legacies as he might think proper to leave, not exceeding in the whole one-fourth of all his property—he entered into a binding engagement that the one-half I have mentioned should, upon his death, be held upon the trusts of the settlement which he then executed.

A doubt has been suggested as to the construction to be put upon the words by which his right to deal with the one-fourth which is excepted from the covenant is reserved to him,—whether its meaning was and is that only one-fourth of the entirety should in any case be excepted, or whether it meant that his debts being paid, he should still be at liberty to dispose of one-fourth of what might remain. It has become unimportant to consider this, for it is admitted that all his debts have been paid, and that he has not exercised such power as he had reserved to himself of leaving legacies: the only legacy left by him, except a small specific bequest of chattels of inconsiderable value, being an annuity of £40, charged upon his personal estate alone, which, as there are no funds to satisfy it, must fail. It is clear, however, that as to the moiety of all his property which he did not engage or bind by his covenant, he remained full master of it, and retained to himself the full and absolute power of disposing of it as he might think fit. Mr. *Smith* lived until 1870, and by his will, dated in September,

(1) 2 Macq. 492. (2) 1 Wh. & T. L. C. 3rd Ed. 303.

V.-C. B. 1876 RUSSELL v. ST. AUBYN. Judgment.

1864, after giving the annuity of £40 payable out of his personal estate, and the specific bequest of chattels before mentioned, he devised and bequeathed:—[His Lordship stated the effect of Mr. *Smith's* will.]

The will contains no mention of or allusion to the settlement, and the trusts declared of the moiety given to Mrs. *St. Aubyn* are, as will be seen, different in several important respects from those of the settlement, but the subject dealt with by the will includes, and is identical with that comprised in the settlement, although the portion given for Mrs. *St. Aubyn* is of larger amount than that which was comprehended in the settlement. Upon this it has been argued on behalf of the parties entitled under the settlement, that they are entitled to have the covenant performed, and that they are under no obligation to accept the moiety given by the will as a satisfaction of that covenant, but, on the contrary, that there can be no residue to which the testator's gift applies until the covenant shall have been satisfied out of the entirety of the testator's estate, and when that shall have been accomplished, but not until then, what may then remain of the estate will be residue divisible into moieties, one of which is subject to the trusts declared in favour of Mrs. *St. Aubyn* and her children, and the other moiety to the trusts declared for Mrs. *Masset* and her family. The consequence of this contention, if it should prevail, would be very greatly to reduce the amount of residue passing by the will, and it has therefore been strenuously resisted on behalf of Mrs. *Masset*. In support of what, for shortness, may be called the *St. Aubyn* contention, it was insisted that the rule which Courts of Equity have adopted in disfavour of double portions, being merely one of presumption, is capable of being rebutted (as undoubtedly it is), and that it is effectually rebutted by the fact that no mention of the settlement is to be found in or to be inferred from the expressions of the will—and more especially by the difference between the trusts of the settlement and those declared by the will. Among other cases which were cited, great reliance was placed on the comparatively recent decision by the House of Lords in *Chichester* v. *Coventry* (1). In that case a father had covenanted, upon the marriage of one of his two daughters and only children,

(1) Law Rep. 2 H. L. 71.

to pay on demand £10,000 to the trustees of her settlement, with interest in the meantime. He afterwards made his will, directing his trustees in the first place to pay his debts and legacies, and then to divide the residue of his estate into moieties, and to hold them upon trust for his two daughters, the trust being very different from those declared by her settlement. It was there decided that the gift of a moiety of the residue was not to be taken as a satisfaction of the debt of £10,000, but that the debt was to be paid out of the testator's estate before the residue, which was divisible into moieties, could be ascertained. The great differences between the trusts of the settlement and those declared by the will are particularly noticed by the noble and learned Lords who assisted in the decision in that case, and seem to have enabled their Lordships to distinguish that case from *Thynne* v. *Earl of Glengall* (1). In the latter case, a testator, upon the marriage of one of his two daughters and only children, had partly paid and partly secured £100,000 upon trust for the daughter's separate use for life, and after her death, for the children of the marriage, as the husband and she should jointly appoint. He afterwards gave by his will a moiety of the residue of his personal estate in trust for the daughter's separate use for life, with remainder for her children generally, as she should by deed or will appoint. It was held by the House of Lords in that case that the moiety of the residue given by the will was a satisfaction of the bond debt, notwithstanding the difference of the trusts; and the daughter and her children, if she should have any, were put to their election whether they would take under the will or insist upon satisfaction of the bond debt; and it being found that it would be for the benefit of the daughter and her children that she should take under the will, it was decreed that she was bound to elect so to take.

The law upon the subject of double portions—for the law it is, though it has sometimes been called a rule and sometimes the leaning of the Court—has been the subject of very frequent discussion, and may, I think, be taken to be conclusively settled. In *Weall* v. *Rice* (2), an authority frequently referred to, and never dissented from, the question arose upon a case in which a father had agreed upon the marriage of his daughter to settle

(1) 2 H. L. C. 131. (2) 2 Russ. & My. 251.

V.-C. B. 1876 RUSSELL v. ST. AUBYN. Judgment.

lands of the value of £3000 in trust for his daughter for life, to her separate use, with remainder to the husband for life, remainder to the children as tenants in common in tail with cross remainders; and by his will he devised an estate worth more than £3000 in trust for his daughter for life to her separate use, but without power of anticipation or alienation, remainder to the husband for life, he maintaining and educating the children of the marriage; remainder to the children of the marriage as tenants in common in fee, with a limitation over of the shares of those who should die under twenty-five without leaving issue. The judgment not only contains a very clear and unquestionably an authoritative exposition of the law, but the case has in fact, as well as in principle, a closer resemblance to that before me than any of the others which have been cited. The sum of £3000 is mentioned in the agreement for a settlement; the donation by the will was larger by one-fourth than the amount of the obligation which the testator had imposed upon himself. Notwithstanding the difference in the limitations contained in the two instruments the two provisions were held to be of substantially the same nature. Now, what is the difference between the obligation which the testator assumed in the present case, and the provision which he has made by way of portion for his daughter by his will? By the settlement the husband would take an interest for life; by the will the wife takes the first life interest to her separate use, and the subsequent life interest is given to the husband determinable upon his bankruptcy or alienation. By the settlement there is a joint power of appointment by the husband and wife, or the survivor of them, among the children of the marriage; by the will a power of appointment is given to the wife among her children generally or more remote issue, with an ultimate limitation in default of such issue upon the trusts declared of the other moiety of the testator's estate in favour of his daughter Mrs. *Masset*. The provision by the will for Mrs. *St. Aubyn* and her children being, as it is not disputed, a portion given by a father to his daughter, and therefore not effectual if it be a double portion, are the circumstances so slight as to bring it within the rule? I have adverted to the differences which were held in *Weall* v. *Rice* (1) to be so slight as to make the

(1) 2 Russ. & My. 251.

rule against double portions applicable. In that judgment the question is said to be one which "every Judge must decide for himself." In discharging that difficult task I am assisted and guided by the decision of the House of Lords in *Thynne* v. *Earl of Glengall* (1), where the difference being that by the settlement the appointment among the children was to be joint by the husband and wife, and under the will by the wife alone, and that under the settlement the children of the marriage were the only objects of the appointment, and under the will the children of the daughter generally, those differences were held, according to the rule applicable to double portions, not to negative the presumption of satisfaction. In considering the cases of *Thynne* v. *Earl of Glengall* and *Chichester* v. *Coventry* (2), it may be borne in mind that the Court in the first case applied the rule against double portions to a subject in which the amount of the testator's agreement was somewhat less than £67,000, while the residue given by his will was more than £185,000. In the second case the Court came to a contrary conclusion, the testator's obligation then being £10,000, and the residue given by his will is stated to have been very considerable. What influence, if any, the differences between the amounts may have had on the judgments in the two cases I am unable to ascertain; although if there be any substantial discordance between *Thynne* v. *Earl of Glengall* and *Chichester* v. *Coventry*, it is not for me to attempt to bring them into harmony, I have the satisfaction of being convinced that nothing was said in the latter case to dissent from the law as decided in *Weall* v. *Rice* (3). That case, and also *Thynne* v. *Earl of Glengall*, were both referred to in the arguments and noticed in the judgments. If the difference between the trusts in the settlement and those expressed in the will in *Weall* v. *Rice* were held to be slight, I think I cannot possibly hold that the differences in the two instruments in this case ought to be considered as otherwise than slight. But that is not all; it is not only upon the circumstances I have mentioned that the question is to be decided. That question, whether a gift in a will is to be considered as a satisfaction of a portion given by a settlement, or a portion given by settlement is to be taken as an ademption of a gift by will, as was said in *Chichester*

(1) 2 H. L. C. 131. (2) Law Rep. 2 H. L. 71.
(3) 2 Russ. & My. 251.

V.-C. B. 1876 RUSSELL v. ST. AUBYN. Judgment.

v. *Coventry* (1) to be, and as it always must be, "is one of intention." The presumption which the law makes, may, in the words of Sir *J. Leach*, "be rebutted or fortified by intrinsic evidence derived from the nature of the two provisions, or by extrinsic evidence." The facts in this case are clear: a man with only two children contracts upon the marriage of one of them that he will leave to or for her three-eighths of all that he shall die possessed of. Can any other presumption be drawn from this than that he meant to retain to himself the power of disposing of the rest of his property as he might think fit? When at a later period of his life—thirteen or fourteen years afterwards—he makes such a will as is now before me, whereby he divides his property, being the same identical subject of which a division is contemplated by the settlement, in equal portions between his two daughters, can it be rationally or lawfully presumed that he intended one of them to have three-eighths of the entirety and the half of what should remain, and to leave to the other only one half of what should remain after three-eighths had been deducted? or that his covenant in the settlement is to be treated as a bond debt for a liquidated sum payable at his death, or, as was the case in *Chichester* v. *Coventry*, payable on demand? In my opinion, no such conclusion can be drawn from the instruments, and from the undisputed facts of the case. I find the subject of the covenant and of the will to be identical, except only (if it be an exception) that the will gives a larger quantity, of the same identical subject, than was comprised in the settlement. I find upon the face of the will that the testator, giving a portion to one daughter, gives an equivalent portion to the other daughter. Can I by law or in justice say that it was his intention that the provisions so made for his daughters should be so grossly unequal? I think not. On the contrary, I think that the presumption which the law makes against double portions is established, and must prevail. The consequence is, that the several persons interested under the settlement, all of whom are *in esse*, must elect whether they will rely upon the provision covenanted to be made by the settlement, or whether they will take under the will.

Solicitors: *Vizard, Crowder, & Co.; Rashleigh & Smart.*

(1) Law Rep. 2 H. L. 71.

BELL *v.* TURNER.

V.-C. H.
1876
Feb. 18.

[1872 B. 146.]

Practice—Chancery Amendment Act (15 & 16 *Vict. c.* 86, *s.* 55)—*Decree—Petition, before Chief Clerk's Certificate, for Sale of Real Estate.*

By a decree accounts were directed of the deficiency, if any, in trust funds which the estate of a deceased trustee was declared liable to answer. Before certificate, but after it had been ascertained that there would be a deficiency, and that the personal estate of the deceased trustee would be insufficient, the existing trustee had redeemed a mortgage on the real estate of the deceased trustee, and the persons interested in the trust fund now petitioned for an immediate sale of the property so redeemed:—

Held, that the Court had jurisdiction to order the sale under 15 & 16 Vict. c. 86, s. 55.

Statement.

J. P. HOWARD, who died in March, 1865, by will in August, 1861, gave to *C. Turner*, *Anne Camphausen*, and *J. J. Howard*, a freehold house and one-third of his residuary estate (the other two-thirds being given to *A. Camphausen* and *J. J. Howard*) upon trust for *J. S. Bell* for life, for her separate use, and after her decease upon trust for her husband, *C. T. Bell*, in case he should survive her, and after the decease of the survivor, in trust for the children of *J. S. Bell*.

The testator appointed *A. Camphausen* and *J. J. Howard* executrix and executor of his will, and by a codicil in August, 1863, gave them a further sum of £6500, to be held upon the trusts declared by the will for the benefit of *J. S. Bell*, and her said husband and children.

J. J. Howard died in March, 1871, having by will in September, 1870, given to his wife (a Defendant) all his real and personal estate, and appointed her executrix.

C. T. Bell died in December, 1871, leaving four children, and on a bill filed by them and their mother, *J. S. Bell*, in May, 1872, against *C. Turner*, *A. Camphausen*, and her husband, and the widow of *J. J. Howard*, and others, complaining that their trust moneys had been advanced upon insufficient security, and praying for a declaration that there had been a breach of trust, and for consequential

V.-C. H. 1876 BELL v. TURNER. Statement.

relief, the Court ordered the property on which the trust moneys had been advanced to be sold, and declared that in case the moneys arising from such sale should be insufficient to satisfy what was due on such security, *C. Turner*, *A. Camphausen*, and her husband, and the estate of *J. J. Howard*, must make good the deficiency; and also ordered certain accounts and inquiries.

The mortgaged property had been sold, and there was a deficiency of £4000 principal, besides a sum of £1602 interest due, and also certain mortgagees' costs.

The Chief Clerk had proceeded to take the accounts, and though no certificate had been made, it was stated that the estate of *J. J. Howard* would be liable to make good upwards of £9000.

The mortgagees of an estate of *J. J. Howard* having advertised it for sale, the new trustees who had been appointed of the will of *J. P. Howard*, as far as regarded the *Bells'* trust funds, offered to redeem the mortgage, but as the mortgagees disputed their right to redeem, they filed a bill (*Harfield* v. *Bailey*) praying to be allowed to redeem; and an order having been made enabling them to do so, they paid the money due on the mortgage (£4430), and obtained a conveyance of the estate.

The widow of *J. J. Howard* married *F. J. Padley*. On the marriage a settlement of her property was executed. The *Padleys* admitted assets of *J. J. Howard* sufficient to answer the demand against his estate, but it appearing that such admission was not *bonâ fide*, a bill was prepared (*Harfield* v. *Padley*) praying that, notwithstanding such admission of assets, the real and personal estate of *J. J. Howard* might be administered by the Court, and that a receiver might be appointed. Before, however, the bill was filed, the admission of assets was withdrawn, and they consented to a receiver being appointed in *Bell* v. *Turner*.

This was a petition by *J. S. Bell's* second husband (she having died), and her four infant children, under the 15 & 16 Vict. c. 86, s. 55; and after stating all the facts, it alleged that the personal estate of *J. J. Howard* was insufficient to answer the demand to which his estate was liable; stated that it would be necessary that his real estate should be sold, and prayed that the estate which had been redeemed by the trustees of the will of *J. P. Howard* might be sold; for an account of what was due to the trustees;

and for a declaration that the balance of the proceeds, after paying them, formed part of the infants' trust estate.

Dickinson, Q.C., and *C. Herbert Smith*, for the Petitioners, after stating the facts, submitted that this application was clearly within the provisions of the 15 & 16 Vict. c. 86, s. 55; and that it was expedient to come to the Court now, as the hearing of the cause on further consideration might not come on for a considerable period. The trustees, who had obtained from certain bankers an advance of the money necessary to redeem the estate, were desirous of selling it and paying the bankers. Further, it was a residential property, and might become less valuable. They referred to *Tulloch* v. *Tulloch* (1).

Bristowe, Q.C., and *C. H. Turner*, for the trustees, supported the petition.

Ince, Q.C., and *Oswald*, for the Respondents, the *Padleys*, submitted that there was no necessity for this application, as there was no interest in arrear when the trustees paid off the mortgage money; and the trustees had a power of sale. Also that this was a novel experiment, as it had no foundation in law or in the practice of the Court. It was an attempt to get the benefit of execution before obtaining judgment.

They contended that the balance that might be due to the Petitioners could not be known until the Chief Clerk had made his certificate; and when the cause came on to be heard on further consideration the *Padleys* might be prepared to pay the amount (if any) which might be due from them. The 55th section simply applied to cases where, before decree or decretal order, it was desirable to sell property, and not to this case, in which there had been a decree. If it was right to sell the estate, the application should have been made before decree. That the personal estate of *J. J. Howard* was insufficient was an allegation of the Petitioners merely, as the accounts had not yet been taken. The petition ought to be dismissed, and with costs. They referred to *Prince* v. *Cooper* (2).

(1) Law Rep. 3 Eq. 574.

(2) 16 Beav. 546.

V.-C. H. 1876 BELL v. TURNER. Judgment.

HALL, V.C.:—

In my opinion this application is perfectly regular, reasonable, and proper, under the circumstances. The petition is well founded upon the 55th section of the 15 & 16 Vict. c. 86. In the decree made in the cause there was a declaration that the estate of *J. J. Howard* was liable to make good the deficiency, if the moneys arising from the sale of the mortgaged property should be insufficient to satisfy what might be due on the security taken by him, *Turner*, and *Camphausen*. That declaration created a charge against *J. J. Howard's* estate, and not merely against his representatives. The inquiries and the taking of the accounts have proceeded far enough to shew that there will not be personal assets of *J. J. Howard* sufficient to answer the demand; and that the real estate, which it was the object of the suit to make assets, must be resorted to.

In this state of things it is right and proper that provision should be made for payment, as early as possible, out of this estate of the sum borrowed by the trustees. The case is within the language of the 55th section, and it is the course of the Court that when it is shewn that it will be necessary to resort to real estate to make an order for the sale of it, without waiting for the hearing on further consideration, the only question always being whether it is just and proper to make that order. That has been made clear in this case, but I will not make the order at present, for the reason that the Respondents who are interested in the estate subject to these charges may raise sufficient money to satisfy the demand, as they desire to keep the estate; therefore, as an indulgence to them, I will not direct the sale to take place at once, but postpone it till further consideration. The costs of the Petitioners must be provided for upon the further consideration; and as to the costs of the Respondents, there will be no order.

Solicitors: *Rickards & Walker; Arthur Cayley; Walter Webb.*

SWEETING *v.* PRIDEAUX.

V.-C. H.

1876

Feb. 21.

[1874 S. 317.]

Will—Gift by Implication to Children of Daughter.

A testator gave to his sons *H.* and *J.* £16,000 upon special trust and confidence to invest and to pay the income of £8000, part thereof, to his daughter *A.* for life for her separate use, and after her death to divide the £8000 amongst her children at twenty-one years of age. He then directed that *H.* and *J.* should pay the income of the remaining £8000 to his daughter *S.* for life in the same manner in every respect and subject to the same control as he had directed as to his daughter *A.*, it being his intention that his said daughters' fortunes should not be subject to the debts of their husbands. He then gave to *H.* and *J.* a sum of £6000, to invest and pay the income to his son *S.*, and to divide the principal amongst his children. The sums were charged on real estate. There was power to apply the income for the maintenance and education of the daughters' and sons' children. The daughter *S.* died, leaving four children who had attained the age of twenty-one. The fund representing the £8000 had been paid into Court:—

Held, that by implication the four children were entitled to the fund.

Statement

HENRY SWEETING, who died in December, 1819, by will in March, 1817, gave to his two sons, *Henry* and *John*, the sum of £16,000 upon special trust and confidence that they or the survivor of them, or the executors or administrators of the survivor, should place the same out on government or real securities, and pay the interest or dividends of £8000, part thereof, to his daughter *Ann* for life, and her receipt alone, notwithstanding any marriage she might contract, should be a sufficient discharge for the same, and that it should in no way be liable to the control or subject to the debts of her husband; and after her death his will was that the said sum of £8000 should be equally divided amongst her children, if more than one, as they should attain the age of twenty-one years; and if she should have only one child, then that the same should be paid to such one child; and if his said daughter should die leaving no child or children, or no child or children should live to the age of twenty-one years, then it was his will that the same should be divided amongst her next of kin according to the *Statute of Distributions;* and his further will was

V.-C. H. 1876

SWEETING v. PRIDEAUX.

Statement.

that his said sons *Henry* and *John*, their executors or administrators, should pay the dividends or interest of the remaining sum of £8000 to his daughter *Sarah* for life, in the same manner in every respect and subject to the same control as he had before directed as to his daughter *Ann*, it being his intention that his said daughters' fortunes should [not] be subject in any manner to the control, debts, or engagement of their husbands. The testator then gave to his sons *Henry* and *John* a further sum of £6000, upon trust that they, or the executors of the survivor, should invest the same and pay the income for the benefit of his son *Samuel*, and in case he should marry, divide the principal amongst his children, and if he should die without issue, the £6000 was to be considered as part of his personal estate. The testator charged his estate at *Godmanchester* with the payment of the £16,000 and £6000, and gave his sons *Henry* and *John* full power to apply the interest or dividends of the £16,000 and £6000 for the maintenance and education of his said daughters' or sons' children, as they might think proper. The testator then gave certain hereditaments to his son *Charles* in fee, but charged with the sum of £8000, which he gave to his son *William* absolutely, to be paid within five years after the testator's decease, and, until paid, to pay interest at £4 per cent. He then gave to his sons *John* and *George* £8000 each absolutely, to be paid within five years, and to bear interest at £4 per cent. in the meantime. These legacies and all debts were to be paid out of the personal estate. The daughter *Sarah* (who died in June, 1874) married and had four children, all of whom attained the age of twenty-one years.

There was a gift of residue to the son *Henry*, of whom the Plaintiff was a grandson.

This was a suit for a declaration as to who were entitled to the fund representing the £8000, and, if necessary, for the administration of the testator's estate; and the question was, whether the children of *Sarah* were by implication entitled to the fund representing the £8000.

Argument.

Morgan, Q.C., and *E. W. Byrne*, for the Plaintiff, submitted that the £8000 became part of the testator's residuary estate, and

asked for a decree upon that footing, and costs out of the fund. They referred to *Dowling* v. *Dowling* (1) and *Hindle* v. *Taylor* (2).

Argument.

Dickinson, Q.C., and *Solomon*, for the Defendant, *A. C. Sweeting*, in the same interest:—

The testator disposed, as to the first £8000, of capital and income, and as to the £6000 did the same; but as to the second £8000 he merely disposed of the income. The words of the will ought to be adhered to.

[They referred to *Savage* v. *Tyers* (3) for the observations of Lord *Hatherley*, L.C., in reference to the case of *Lassence* v. *Tierney* (4), before Lord *Cottenham*, and to *Fitzhenry* v. *Bonner* (5).]

Locock Webb, Q.C., and *Davenport*, for Defendants in the same interest, submitted that there was nothing in the will shewing an implication, necessary or otherwise, that the children of *Sarah* were to take the £8000, and that the residuary legatees, to whom there was an express gift of everything not disposed of, were entitled to the fund.

W. Pearson, Q.C., and *Ferrers*, *Westlake*, Q.C., and *Joyce* and *Bathurst*, for other Defendants, the children of *Sarah*, were not called upon.

HALL, V.C.:—

Judgment.

I am of opinion that, upon the true construction of this will, the testator intended that the children of his daughter *Sarah* should have benefits which amounted to a gift of the corpus of the £8000 to them. Several cases have been referred to, but the principle which will guide me is to be found in the case of *Key* v. *Key* (6), where Lord Justice *Knight Bruce* (7) said: "In common with all men I must acknowledge that there are many cases upon the construction of documents in which the spirit is strong enough

(1) Law Rep. 1 Ch. 612. 12 Jun 1720
(2) 5 D. M. & G. 577.
(3) Law Rep. 7 Ch. 356.
(4) 1 Mac. & G. 551.
(5) 2 Drew. 36.
(6) 4 D. M. & G. 73. 17 Jun 769.
(7) 4 D. M. & G. 84. 17 Jun 769

V.-C. H. 1876 SWEETING v. PRIDEAUX. Judgment.

to overcome the letter; cases in which it is impossible for a reasonable being, upon a careful perusal of an instrument, not to be satisfied from its contents that a literal, a strict, or an ordinary interpretation given to particular passages, would disappoint and defeat the intention with which the instrument, read as a whole, persuades and convinces him that it was framed. A man so convinced is authorized and bound to construe the writing accordingly." And the same principle is to be found in the case of *Towns* v. *Wentworth* (1), where the Right Honourable *T. Pemberton Leigh*, afterwards Lord *Kingsdown*, said (2): "When the main purpose and intention of the testator are ascertained to the satisfaction of the Court, if particular expressions are found in the will which are inconsistent with such intention though not sufficient to control it, or which indicate an intention which the law will not permit to take effect, such expressions must be discarded or modified; and, on the other hand, if the will shews that the testator must necessarily have intended an interest to be given which there are no words in the will expressly to devise, the Court is to supply the defect by implication, and thus to mould the language of the testator, so as to carry into effect, as far as possible, the intention which it is of opinion that the testator has on the whole will sufficiently declared."

In this case the testator gave to his sons *Henry* and *John* a sum of £16,000 upon special trust and confidence that they should place the same out on government or real securities. The sum was raisable out of his real estate, and the whole £16,000 was separated once and for all from the estate upon which it was charged. He then gave the income of £8000 to his daughter *Ann*, and the corpus to her children, and then dealt with the income of the other £8000 in favour of his daughter *Sarah*, and then gave the income of £6000 to his son *Samuel* and the corpus to his children. The daughters were treated collectively, it being his intention that their "fortunes" should be alike, and the income was not only given to them, but there was a provision for the maintenance and education of his "said daughters' and sons' children" as the trustees might think proper. There was a separate provision for the heads of the three families. It is impossible, upon a fair

(1) 11 Moo. P. C. 526. (2) 11 Moo. P. C. 543.

V.-C. H. 1876 SWEETING v. PRIDEAUX.

construction of the will, to exclude the children of *Sarah* from having the benefit of this fund. It is, in my opinion, as clear an implication as can exist in any case, and the subsequent provisions confirm this view. I think the case falls entirely within the observations of Lord Justice *Knight Bruce* in the case to which I have referred. The declaration will be that the four children of *Sarah* take absolutely the fund.

Solicitors: *Edmund Byrne; Davies, Campbell, Reeves, & Hooper; Prideaux & Son; W. A. Holcombe.*

BRACKENBURY *v.* GIBBONS.

V.-C. H. 1876 *Feb.* 22.

[1872 B. 383.]

Will—Life Estate—Contingent Remainder—Executory Devise.

A testator devised to his daughter *N.* an estate for life, and after her decease to her child or children who, either before or after her death, should attain the age of twenty-one, or die under that age leaving issue at his, her, or their death, in fee simple as tenants in common; and in case there should be no child of *N.* who should attain twenty-one or die under that age leaving issue, he gave the estate to the child or children of his daughter *G.* who, either before or after her death, should attain twenty-one, or die under that age leaving issue living at his, her, or their death, in fee as tenants in common. *N.* had no child. At the death of *N.* two children of *G.* had attained the age of twenty-one. Other children attained twenty-one subsequently:—

Held, that the two children were entitled to the estate.

Statement.

R. TODD, who died in October, 1857, by will in December, 1854, gave unto his daughter, *H. Nundy*, his hereditaments at *Bucknall*, to hold the same unto his said daughter during her life, and after her decease he gave the same hereditaments unto the child, if only one, or all the children, if more than one, of his said daughter who, either before or after her death, should attain the age of twenty-one years, or die under that age leaving issue at his, her, or their death, or respective deaths, in fee simple, such children, if more than one, to take as tenants in common; and in case there should be no child of the said *H. Nundy* who should attain the age of twenty-one years or die under that age leaving

V.-C. H. 1876

BRACKENBURY v. GIBBONS.

Statement.

issue, then he gave the same hereditaments unto the child, if only one, or all the children, if more than one, of his daughter *E. Gibbons* who, either before or after her death, should attain the age of twenty-one years, or die under that age leaving issue living at his, her, or their death, or respective deaths, in fee simple, such children, if more than one, to take as tenants in common.

At the death of *H. Nundy*, on the 8th of April, 1864 (who died without having had any child), two children of *E. Gibbons* had attained the age of twenty-one, viz., *Susannah Maria*, the wife of *J. Cawdron*, and *Marshall Gibbons*. No child of *E. Gibbons* had died under the age of twenty-one years leaving issue. There were other children who attained twenty-one after the death of *H. Nundy*.

Marshall Gibbons, who died in May, 1869, by will in April, 1869, gave unto his sister *Lucy* (the Defendant) all his share of the hereditaments belonging to him under the will of his grandfather, *R. Todd*.

This was a suit for partition; the Plaintiff, as purchaser of Mrs. *Cawdron's* interest, claiming to be entitled to a moiety of the hereditaments, or for a sale.

Argument.

Hadley, for the Plaintiff, after referring to and commenting on the cases of *Countess of Bective* v. *Hodgson* (1), *Holmes* v. *Prescott* (2), *Duffield* v. *Duffield* (3), *Rhodes* v. *Whitehead* (4), *Perceval* v. *Perceval* (5), and *Browne* v. *Browne* (6), and submitting that this was a contingent remainder, and that the law was now settled by the decision in *Holmes* v. *Prescott* and *Perceval* v. *Perceval*, was stopped by the Court.

H. A. Giffard, for younger children of *E. Gibbons*, contended that this case was distinguishable from *Holmes* v. *Prescott* and *Perceval* v. *Perceval*. The clear intention of the testator was expressed, viz., that all the children of his daughter, *E. Gibbons*, who attained twenty-one or died under that age leaving issue should take as tenants in common, and the Court ought to give

(1) 10 H. L. C. 656. 10 Jur. N.S. 573
(2) 10 Jur. (N.S.) 507
(3) 3 Bli. (N.S.) 260.
(4) 2 Dr. & Sm. 532.
(5) Law Rep. 9 Eq. 386.
(6) 3 Sm. & Giff. 568. 3 Jur. N.S. 72

effect to it. Though there was a rule of law that there must be a particular estate to support a contingent remainder, yet the Court would, in order to give effect to the intention, construe the gift as an executory devise, and thus let in all those who came within the description in the will. These children formed a class, and there was no rule which excluded them as a class. There was no transgression of the rule against perpetuity in this case, and he submitted that there was no rule which excluded these children from coming in and sharing in the remainder, which had been prevented from being defeated by the fact that two members of the class attained the age of twenty-one in the lifetime of the tenant for life. He referred to *Browne* v. *Browne* (1); *Festing* v. *Allen* (2); *Riley* v. *Garnett* (3); *Doe* v. *Nowell* (4); *Doe* v. *Hopkinson* (5); *Price* v. *Hall* (6); *Ex parte Styan* (7); *Muskett* v. *Eaton* (8).

Speed, for the Defendant and a mortgagee, referred to the case of *Mogg* v. *Mogg* (9).

HALL, V.C.:—

Judgment.

I am of opinion that this case is covered by decisions which I cannot question. Looking at the authority of *Holmes* v. *Prescott* (10) and *Rhodes* v. *Whitehead* (11), it must be considered that the law is settled as to a gift of this kind; and every gift which can take effect as a remainder absolutely excludes its being treated as an executory devise. The two children who had attained twenty-one at the death of the tenant for life took vested interests, and no authority for the proposition that there should be a divesting in order to let in subsequent takers has been referred to. I cannot apply the law applicable to executory devises to such a limitation as this. In *Jarman* on Wills (12) it is stated that those children who attain the age of twenty-one at the particular time take to the exclusion of all others who attain that age subsequently. As to

(1) 3 Sm. & Giff. 568.
(2) 12 M. & W. 279.
(3) 3 De G. & Sm. 629.
(4) 1 M. & S. 327; 5 Dow. 202.
(5) 5 Q. B. 223.
(6) Law Rep. 5 Eq. 399.
(7) Joh. 387.
(8) 1 Ch. D. 435.
(9) 1 Mer. 654, 657.
(10) 10 Jur. (N.S.) 507.
(11) 2 Dr. & Sm. 532.
(12) Vol. i. p. 239.

V.-C. H. 1876 BRACKENBURY v. GIBBONS. Judgment.

whether this remnant of the feudal law ought to be altered or not by the Legislature, I say nothing. There were persons who thought that contingent remainders ought to be abolished, and when the first Act preserving contingent remainders from failure in certain cases was passed some years ago a clause was introduced for giving effect to every gift by way of contingent remainder which would have had effect given to it had it been an executory devise, but the law was otherwise settled.

Solicitors: *Norris, Allens, & Carter; Taylor, Hoare, Taylor, & Cooke.*

V.-C. H. 1876 *March* 13.

JONES *v.* EVANS.

[1864 J. 6.]

Administration Suit—Proof of Debt by Executor—Bequest of Debt—Right of Retainer—Deficient Fund—Costs.

A creditor proved his debt in an administration suit and then died, having bequeathed the debt to the executrix of the testator in the cause:—
Held, that she had no right of retainer in respect of it.

Statement.

AN executrix, some years after the death of the testator, and also some years after the institution of the suit and the decree for administration, became a legatee of a simple contract debt of about £900, which had been due to her father, one of whose executrixes she was, and which had been proved by him in the cause. The question now, on further consideration, was whether, having become beneficially entitled to this debt, she had a right of retainer, as if the debt had been originally due to herself.

Argument.

Hemming, Q.C., and *Dickins*, for the Plaintiff:—

There is not in this case the ordinary right of retainer which the law gives to an executor. The reason usually assigned for allowing the retainer, viz., that the executor cannot sue himself, has no application to a case like this, where the debt has already been proved and the rights of the creditor fixed.

Karslake, Q.C., and *Badcock*, for the executrix, submitted that

the right of retainer was not affected by proof of the debt in the suit. That being so, it did not signify whether the right existed at the commencement of a suit or afterwards. The principle of the case was that an executor could not sue himself.

Argument.

[HALL, V.C.:—Is there any authority that an executor can pay himself a debt to which he has become entitled after it has been proved?]

There was no distinct authority, but the principle was established, and that being so, the circumstance that the original creditor proved the debt could not matter in the least. There was enough to pay the specialty creditors in full, and therefore the question of costs as regarded them could not arise. The onus was on the Plaintiff to shew that the right of retainer did not exist in a case where the executrix became entitled to the debt after the decree. This right was allowed because there was no person to sue, and it existed until the assets were completely distributed. They referred to *Williams* on Executors (1), and to *Ram* on Assets (2) and cases there cited, especially to *Nunn* v. *Barlow* (3). There the administrator who claimed to retain had, before he became administrator, proved a debt against the estate being administered, and had been reported a creditor, and paid part of his debt. Having become administrator he claimed to retain the balance of the debt out of assets received since the proof, and the Vice-Chancellor allowed the retainer. That case shewed that proof of the debt was immaterial, and that the right to retain, though it did not exist at the time of the decree, might accrue at any time before the assets were distributed. If so, the circumstance that the debt sought to be retained had become vested in the executrix after the decree and proof under it could not be material.

Freeling, for the representative of the real estate, asked for his costs.

HALL, V.C.:— Judgment.

It does not appear that there is any authority which decides

(1) 5th Ed. p. 936, *et seq.* (2) Page 263, *et seq.*
(3) 1 S. & S. 588.

V. C. H. 1876 JONES v. EVANS.

that an executrix can acquire by bequest from a creditor, who has come in and proved his debt, not merely the benefit of that proof, but a right to retain the whole of the amount due out of the assets, notwithstanding the decree that the estate must be administered by the Court; and in the absence of any such authority, I shall hold that the right of retainer does not exist. Therefore the claim must be disallowed.

Solicitors: *Bell, Crowder, & Greenfield; G. L. P. Eyre & Co.*

Ex parte HARRIS. *In re* LEWIS.

C. J. B.
1876
Feb. 21.

Debtor's Summons—Debt due to Receiver in Chancery—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 6, 7.

A receiver in Chancery can issue a debtor's summons in respect of a sum due to him in that character.

Ex parte Muirhead (1) distinguished.

Statement.

THIS was an appeal from a decision of the Judge of the *Winchester* County Court.

A debtor's summons for £145 2*s.* was issued by *James Harris* against *W. B. Lewis*. The affidavit on which the summons was issued was in the ordinary form, stating that *Lewis* was justly and truly indebted to *Harris* in the sum claimed. *Lewis* applied to have the summons dismissed, and the application was heard by the Judge on the 19th of January, 1876. *Harris* was examined, and admitted that the sum claimed was due to him in the character of receiver appointed by the Master of the Rolls, in an action in the Chancery Division of the High Court, for the administration of the estate of *Benjamin Sillence*, deceased. *Harris* was an auctioneer, and, at a sale held by him on the 19th of August, 1875, of property forming part of the estate of the testator, *Lewis* had become the purchaser of some oats for the sum of £387 15*s.* *Lewis* paid down a deposit of £97 15*s.* at the time, and, in payment of the balance, he indorsed to *Harris* a bill of exchange for £290, drawn by *Lewis* upon, and accepted by, *George Lewis*, and payable three months after date. The bill was not paid at maturity, but *W. B. Lewis* afterwards paid *Harris* £144 18*s.* on account of it. The debtor's summons was issued in respect of the unpaid balance. There was nothing to shew that *Harris* had been authorized by the Master of the Rolls to issue the summons.

The Judge was of opinion that a receiver could not issue a debtor's summons in respect of a sum due to him in that capacity, and he dismissed the summons.

Harris appealed.

(1) *Ante*, p. 22.

C. J. B. 1876 *Ex parte* HARRIS. *In re* LEWIS. Argument.

De Gex, Q.C., and *Rolland*, for the Appellant.

E. C. Willis, for *Lewis*:—

A sum due to a receiver in that character is not a debt due to him at law or in equity, and will not support a petition for adjudication or a debtor's summons: *Bankruptcy Act*, 1869, ss. 6, 7; *Ex parte Muirhead* (1).

Judgment.

BACON, C.J.:—

It is the receiver's duty to receive and get in the estate. He gives security for the due discharge of his duty. He is bound to get in all that can be recovered. He claims, too, as the holder of the bill of exchange. *Ex parte Muirhead* was quite a different case. The order dismissing the summons must be discharged, and the Appellant must have his costs in this Court as well as in the County Court.

Solicitors for Appellant: *Lambert, Petch, & Shakespear*, agents for *C. & F. I. Warner, Winchester.*

Solicitors for Respondent: *Joel Emmanuel & Round*, agents for *W. A. Killby, Southampton.*

C. J. B. 1876 *March* 13.

Ex parte RUSSELL. *In re* WINN.

Bankruptcy — Scheme of Settlement — Annulling Adjudication — Payment of Composition to some Creditors—Postponement of Debts of others—Fresh Trading by Bankrupt—Subsequent Liquidation Petition—Rights of Postponed Creditors—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 28.

The creditors of a bankrupt agreed, under sect. 28 of the Act, to a scheme for the settlement of his affairs, which was afterwards approved by the Court. The scheme provided that a composition of 9*s.* 6*d.* in the pound should be paid to all the creditors but three; that the bankrupt should take back his estate; and that the adjudication should be annulled. The three excepted creditors agreed to make no claim on the bankrupt or his estate for three years from the date of the annulling of the adjudication. On the 20th of April, 1871, the order to annul was made. The composition was paid, the

(1) *Ante*, p. 22.

C. J. B.
1876
Ex parte RUSSELL.
In re WINN.

bankrupt took back his estate; he traded again and contracted fresh debts, and on the 1st of October, 1875, he filed a liquidation petition:—

Held (reversing the decision of the County Court Judge) that the excepted creditors were entitled to prove in the liquidation, and to receive dividends *pari passu* with the new creditors:

Held, that the principle of *Troughton* v. *Gitley* (1) and *Ex parte Bourne* (2) had no application.

Statement.

THIS was an appeal from a decision of one of the Judges of the *Liverpool* County Court.

On the 14th of October, 1870, *William Winn*, a draper at *Liverpool*, was adjudicated a bankrupt. His estate was not sufficient to pay a dividend of more than 5*s.* in the pound, but a friend made an offer to pay a composition of 9*s.* 6*d.* in the pound to all the creditors, except three, in satisfaction of their debts, on condition that the bankruptcy should be annulled, and that the bankrupt should take back his estate. The three excepted creditors agreed not to prove their debts, or to make any claim upon the bankrupt or his estate for three years from the date of the annulling of the adjudication. On the 11th of January, 1871, a special meeting of the creditors was held, at which it was duly resolved that these terms should be accepted, subject to the approval of the Court. The three excepted creditors signed the resolution to express their consent. The resolution was afterwards approved by the Judge, and on the 24th of April, 1871, it was ordered that, on the bankrupt depositing with the Registrar the amount of the composition, the adjudication should be annulled. The composition was duly paid, and *Winn* resumed his business, taking back his whole estate. One of the three excepted creditors was *John Russell*, whose debt amounted to £1050. On the 1st of October, 1875, *Winn* filed a liquidation petition. The creditors resolved on a liquidation by arrangement, and appointed *Henry Bolland* trustee. *Russell* tendered a proof for £1094, being the debt of £1050 and £44 interest thereon. *Winn* had paid him interest for the four years, 1871–1874. The debt of one of the other two excepted creditors had been satisfied. The trustee rejected *Russell's* proof to the extent of £574 7*s.*, on the ground that he could only prove for 9*s.* 6*d.* in the pound, the amount of the composition paid under the arrange-

(1) Amb. 629. (2) 2 Gly. & J. 137.

C. J. B. 1876 *Ex parte* RUSSELL. *In re* WINN.

Statement.

ment to the other creditors. *Russell* applied to the Court to admit his proof for the full amount. The Judge decided that *Russell* was entitled to prove for the whole £1094, but that he could receive no dividends until all the creditors of the debtor, whose debts had accrued since the bankruptcy, had been paid in full. His Honour thought that the principle of such cases as *Troughton* v. *Gitley* (1), *Ex parte Bourne* (2), *Tucker* v. *Hernaman* (3), and *Engelback* v. *Nixon* (4), applied; and his Honour said (after quoting the judgment of Lord *Eldon* in *Ex parte Bourne*): "In the present case I can have no doubt that the abstention of the three excepted creditors from pressing their debts enabled the bankrupt to commence business again after his bankruptcy had been annulled by their consent; in the words of Lord *Eldon*, they permitted him to go into the world as a trader, and to gain credit as such, and I think their claim must be postponed till the creditors under the present liquidation, who had no notice of what had occurred about the composition scheme, except the fact that the bankruptcy had been annulled, have been paid in full."

Russell appealed.

Argument.

De Gex, Q.C., and *Finlay Knight*, for the Appellant:—

The principle of *Troughton* v. *Gitley*, and the other cases on which the Judge relied, has no application. The principle of those cases is, that an assignee or trustee of an undischarged bankrupt, by leaving in his possession property which is not his, but that of the trustee or assignee, enables the bankrupt to gain credit as the owner of the property. It is an extension of the doctrine of reputed ownership. Here the bankruptcy had been annulled, and the new creditors might have found out the terms upon which this had been done. But in truth a man is not bound to say who his creditors are; no one trusts a debtor upon the supposition that he knows all his creditors.

Little, Q.C., and *W. R. Kennedy*, for the trustee:—

The principle of *Troughton* v. *Gitley* applies. The debtor's property has been created by his trading subsequently to the

(1) Amb. 629.
(2) 2 Gly. & J. 137.
(3) 4 D. M. & G. 395.
(4) Law Rep. 10 C. P. 645.

C. J. B. 1876 *Ex parte* RUSSELL. *In re* WINN.

annulling of the bankruptcy, and the new creditors have the prior equity. By an arrangement under sect. 28 the bankrupt is not freed from the equities resulting from his bankruptcy: *In re Lennard* (1); *West* v. *Baker* (2). The ordinary form of notice of the annulling of a bankruptcy (Bankruptcy Forms, 1870, No. 59) gives no notice of the terms on which the order to annul is made. The effect of the annulling of the adjudication is to announce to the world that the debtor is discharged from his debts, and free to enter into new engagements. It would not be equitable that the three postponed creditors, who gave up their right to share with the other old creditors in the assets of the bankrupt, should be paid out of the assets created by the subsequent trading, until the new creditors have been paid in full. The arrangement made with the old creditors was of necessity a fraud on the new ones.

Argument.

BACON, C.J.:—

Judgment.

In my opinion this case is exceedingly plain. The learned Judge against whose decision this appeal is brought founded himself upon the doctrine of *Troughton* v. *Gitley* (3), in which, as in other cases before Lord *Eldon*, the doctrine laid down is plain and distinct. While a bankruptcy is pending, that is, under the old law, until the certificate or the discharge of the bankrupt was granted, or, under the new law, until the bankruptcy is closed, the whole of the estate, present or future, of the bankrupt is vested in his assignee or trustee.

In *Troughton* v. *Gitley* it was not doubted that the whole of the after-acquired property belonged to the assignees under the first bankruptcy; but it was held that there was an equity which entitled the subsequent creditors to be paid their debts before the legal owners of the whole estate should receive the payment of theirs; a principle of equity not confined to *Troughton* v. *Gitley*, but established by a multitude of decisions, viz., that if a man having rights will stand by and sleep on them, he shall not afterwards be able to assert those rights in preference or superiority to

(1) 1 Ch. D. 177. (2) 1 Ex. D. 44.
(3) Amb. 629.

C. J. B. 1876 *Ex parte* RUSSELL. *In re* WINN. Judgment.

subsequent creditors. I cannot perceive that that principle has the slightest application to this case. A bankruptcy being in existence, under the provisions of the statute an arrangement was come to for the payment of a composition to be paid to the creditors in discharge of their debts, one of the objects being to enable the bankrupt to carry on his business again. Besides the persons who were willing to accept the composition, there were three others who did not insist upon receiving the composition then, but gave the debtor three years' time to pay their debts, the object being plainly that their debts should be paid in full, at all events that their right to recover was to exist in full. The resolutions express that in plain terms, and they were entered into with the full knowledge and consent of all the other creditors, and received the confirmation of the Court. When they were passed the bankruptcy was annulled, and the rights of the three excepted creditors remained as they were. What has been done by them to disturb those rights? It is very new to me to hear that a creditor who does not press for payment of his debt thereby commits a fraud upon the other creditors who are entitled to the present payment of their debts. It is very new to me to hear that it is supposed in the commercial world that a man who gives credit to another has priority over his debtor's other creditors because the existence of their debts was not disclosed to him. The Appellant is asking for no more than his just and fair rights. The learned Judge seems to have thought that he was bound to receive the composition. The terms of the resolution shew that he was not. It is only to the creditors who take the composition that the arrangement applies; there is a saving in express terms of the rights of the three creditors. What have those creditors done to diminish their rights? They were not, as the assignee was in *Troughton* v. *Gitley* (1), not as the trustee was in the very recent case of *Ex parte Ford* (2), entitled to take the whole of the debtor's after-acquired property. They had no such right. All the right that they had was that which existed at the time of the composition, and which is reserved to them in plain terms by the arrangement made with the other creditors, and confirmed by the

(1) Amb. 629. (2) 1 Ch. D. 521.

Court. Then I ask what has been done by these three creditors? Under what obligation were they to look after their debtor, to see how he was trading, to know with whom he had contracted debts? Under what obligation were they to insist on payment of their own debts until it seemed good to them to make such a demand? The debt, as it existed at the time of the first bankruptcy, and as it is reserved by the resolution, exists in its full vigour to this day, and I think the Appellant is plainly entitled to prove *pari passu* with all the creditors under this second insolvency, and to receive dividends upon the whole amount of the debt that was due to him. If *Troughton* v. *Gitley* (1) had any application to this case, then I should have agreed with the learned Judge in the order which he has made. It is because it is essentially different, and because no laches can be imputed to the creditor, because there has been no fraud and no delay upon his part, that I am compelled to differ from the learned Judge. I think that the order has proceeded upon a wrong foundation, and the right of the Appellant is to have his proof admitted for the whole amount of his debt (the amount not being in dispute), and to receive dividends *pari passu* with the other creditors who are entitled to share under the liquidation. The Appellant will have his costs of the appeal.

Solicitor for Appellant: *E. W. Owles*, agent for *W. Harper, Liverpool.*

Solicitor for Trustee: *C. C. Deane, Liverpool.*

(1) Amb. 629.

C. J. B.

1876

March 20, 27.

In re DIXON. *Ex parte* SHEPHERD.

Composition—Costs of Debtor's Solicitor—Action against Debtor—Injunction—Taxation—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 72, 126.

23 L.D. 121

The Court of Bankruptcy has jurisdiction in a case of composition to order the taxation of the bill of costs of the debtor's solicitor.

In a case of composition, where a trustee was appointed, to whom the debtor gave a bill of sale of his property to secure the payment of the composition, the bill of sale containing a trust for sale of the property and for payment of the costs of the proceedings out of the sale moneys, an action, brought against the debtor by his solicitor for his costs incident to the proceedings, was restrained, on the terms of the trustee paying a sum of money into Court, and giving an undertaking to pay whatever further sum might be found due on the taxation of the bill of costs.

Statement.

THIS was an appeal from a decision of the Judge of the *Luton* County Court.

John Dixon, a newspaper proprietor at *Luton,* filed a liquidation petition on the 31st of May, 1872. On the 17th of June, 1872, at the first meeting of the creditors, it was resolved that a composition of 20*s.* in the pound should be accepted in satisfaction of the debts due to the creditors from *Dixon,* the composition to be payable in four instalments of 5*s.* each, on the 1st of August, 1872, the 25th of December, 1872, the 25th of March, 1873, and the 24th of June, 1873; that the composition should be secured by a bill of sale to be given by *Dixon* to the trustee; and that *W. Neve* should be appointed trustee in the matter.

These resolutions were confirmed at the second meeting, on the 27th of June, and were afterwards registered. On the 5th of July, 1872, a bill of sale was executed between *Dixon* of the one part and *Neve* of the other part, by which (after recitals of the composition proceedings) *Dixon* assigned to *Neve* all his stock-in-trade, machinery, goods, furniture, debts, and all other his personal estate and effects, upon trust to permit *Dixon* to use and occupy the same (but not to dispose thereof) until default by him in payment of any of the instalments of the composition and costs, and in case of default, then upon trust to sell, get in, and realize the property, and out of the moneys so to be received to pay the costs

of the sale and getting in and realizing of the estate, and also the costs of the liquidation proceedings, and the preparing and registering of the bill of sale; and next to pay the debts of the creditors, and to pay the surplus (if any) to *Dixon*. The first instalment of the composition was paid by *Dixon*, but he was unable to pay the second when it became due. In February, 1873, a meeting of the creditors was held, at which it was resolved to grant an extended period of six months for the payment of each of the remaining instalments. At Midsummer, 1873, *Dixon* was still unable to pay, and the trustee soon afterwards took possession under the bill of sale, and ultimately, in 1874, he sold the property for £450, of which £100 was paid at once, and bills extending over a considerable period were given for the balance. *J. G. Shepherd* had acted as solicitor for *Dixon* in the proceedings. In April, 1875, he sent his bill of costs to the trustee, amounting to more than £85, and demanded immediate payment. The trustee answered that when the costs had been taxed they should be paid. *Shepherd* did not take in his bill for taxation. Ultimately, on the 17th of February, 1876, the costs not having been paid, *Shepherd* issued a writ in an action in the Queen's Bench Division against *Dixon* for the amount, and on his application the Judge of the County Court made an order restraining *Shepherd* from proceeding with his action until further order.

Statement.

Shepherd appealed.

Winslow, Q.C., and *W. A. Lewis*, for the Appellant:—

Argument.

The costs due to the solicitor are not a debt proveable under the composition, and he is entitled to sue the debtor for them.

[They were stopped by the Court].

Hensman, and *Wetherfield*, for the debtor:—

The Appellant must be taken to have advised the debtor as to the proceedings and the preparation of the bill of sale, which provides that these costs are to be paid out of the estate. The Appellant must be taken to have submitted to the jurisdiction of the Court, and to have elected to look only to the estate for the payment of his costs. In a case of composition the Court has power to restrain all actions against the debtor: *Bankruptcy Act*, 1869,

C. J. B. 1876 *In re* DIXON. *Ex parte* SHEPHERD. Judgment.

ss. 72, 126; *In re Thorpe* (1). The costs must be taxed, and this can only be done in the Court of Bankruptcy.

BACON, C.J.:—

I have no doubt that the Court of Bankruptcy has jurisdiction under sect. 72, in cases of composition, just as in cases of bankruptcy, to decide all questions which it is necessary to decide for the purpose of doing complete justice. But that has no application to the present case. Funds have come into the hands of the trustee, which it was his duty to apply in payment of these costs. He desired to have the bill of costs taxed, and sect. 72 may apply to this extent, that it may give the Court jurisdiction to tax them. But the solicitor is entitled, irrespectively and independently of the composition, to be paid his costs by the debtor, who by virtue of the composition resolutions is left master of his estate. In *Ex parte Lyons* (2) this matter engaged the attention of the Court of Appeal, and there Lord Justice *James* said: "It does not follow, because there has been a relation between two parties founded on bankruptcy proceedings, that every dealing between them having any connection with that relation is drawn within the jurisdiction of the Court of Bankruptcy." But there it was said that the Court would have had jurisdiction to tax at the instance of the debtor the costs of the receiver appointed under the petition, if the costs had not already been settled between the debtor and the receiver. In the present case it is in the power of the trustee to put an end to the action by taking proper proceedings, but till that has been done the debtor cannot be heard to say that the Appellant's proceedings should be stayed. I am unable to see any principle on which it can be said that the debtor's solicitor is bound by any equity arising from his having advised his client with regard to the bill of sale.

[*Winslow*, Q.C.:—The Taxing Master of this Court always refuses to tax costs in cases of composition, on the ground that he has no jurisdiction to do so.]

I think it is his plain duty to tax them. I will, however, allow the trustee to intervene in this matter. If he will give an under-

(1) Law Rep. 8 Ch. 743. (2) Law Rep. 7 Ch. 494, 498.

taking to pay these costs when taxed, I will order this to be done, and I will then stay the proceedings in the action. The case may be mentioned to me again.

March 27. *Hensman* stated that the trustee was willing to give an undertaking to pay the costs when taxed.

Winslow, Q.C.:—The action against the debtor ought not to be restrained merely because some one else says that he will pay the costs. The money should be brought into Court.

Hensman said that the trustee was ready to pay £50 into Court.

BACON, C.J.:—

On the trustee paying £50 into Court, and giving an undertaking to pay any further sum which may be found due on taxation, I will make an order that the costs be taxed, and further proceedings in the action be restrained. I have no doubt of the jurisdiction to order the taxation of costs in composition proceedings. I shall reserve the costs of this application till the result of the taxation is known.

Solicitors for Appellant: *Lewis, Munns, & Longden*, agents for *Alfred Ewen, Luton.*

Solicitor for Debtor: *Wetherfield*, agent for *Walter Neve, Luton.*

C. A.
1875
M. R.
Dec. 13, 14.
C. A.
1876
March 21, 24, 25.

SINGER MANUFACTURING COMPANY *v.* WILSON.

[1874 S. 239.]

Trade-mark—Trade Name—Improper use—Fraud—Injunction.

When a manufacturer *A.* has acquired a reputation in the market, so that the goods made by him are commonly known by his name, but is not possessed of any patent, a rival manufacturer *B.*, being entitled to imitate *A.*'s goods, is entitled also, provided that he does not place *A.*'s name on his own goods, to advertise his goods and offer them for sale by the name of *A.*, if he takes care to state clearly at the same time that the goods which he sells are manufactured by himself.

Thus the Plaintiffs, the *Singer Manufacturing Company*, having acquired a great reputation as makers of sewing machines, their machines being commonly called "*Singer*" Machines, the Defendant was held to be entitled to advertise for sale his own machines as "*Singer*" Machines, his advertisements always stating that the machines which he sold were manufactured by himself, and the word "*Singer*" not being placed upon his machines.

Statement.

THIS suit was instituted to restrain an alleged improper use by the Defendant of the Plaintiffs' trade-mark, or trade name.

The Plaintiffs were a company incorporated in the *United States of America*, under the style of the *Singer Manufacturing Company*, and they had for some time manufactured and sold sewing machines in *Great Britain*, as well as in *America*. The business was started in the year 1850 by *J. M. Singer*, who afterwards took some other persons into partnership with him, and continued the business under the firm of *J. M. Singer & Co.* In 1863 the company was formed, and acquired the goodwill of the business of *J. M. Singer & Co.* The bill alleged that the firm and the company had acquired a great reputation as manufacturers of sewing machines, by reason of the excellence of their manufacture, and that the sewing machines made by them became generally known as "*Singer*," or "*Singer's*" Machines. This name, however, was generally understood as meaning any machine manufactured by the Plaintiffs, and was not used to designate any one particular construction of machine, as both the company and their predecessors introduced from time to time various alterations and improvements into their machines, which were still known by the

same name. At the time when this suit was instituted, the Plaintiffs were not possessed of any patent right in their machines, though they had possessed patents no longer in force for different portions of their machines. The bill alleged that the Plaintiffs' machines had become well known throughout the world as "*Singer*" or "*Singer's*" Machines, and that the name "*Singer*" had become a trade-mark of the Plaintiffs, and that though the Plaintiffs made, advertised, and sold different kinds of sewing machines of widely different mechanical construction, all their machines were advertised and known to the trade and to the public as "*Singer*" or "*Singer's*" Machines, the several varieties being further distinguished by specific names, such as "*The Family*," "*The New Family*," and so on; and the Plaintiffs had from the commencement of their business uniformly described and advertised their machines as "*Singer*" or "*Singer's*" Machines.

The Defendant was a manufacturer of and retail dealer in sewing machines in *London* and other places in *England*, and in *Dublin*.

The bill contained the following allegation:—

"The Plaintiffs have discovered that the Defendant has been for some time past and now is manufacturing and selling to the public sewing machines not of the Plaintiffs' manufacture as, and has on his price lists described such machines as, and has given to his salesmen and travellers directions to describe and sell such machines as, '*Singer*' or '*Singer's*' Machines. The course of business pursued by the Defendant is calculated to mislead, and has misled purchasers into the belief that the machines offered for sale by the Defendant are machines of the Plaintiffs' manufacture, and has injured, and if persisted in will further injure, the Plaintiffs' business, and the Defendant threatens and intends to persist in so describing his machines, and to continue the same course of business." The bill also alleged that the Defendant's machines were inferior to those of the Plaintiffs, and that the result of their being thrown on the market under the name of "*Singer*" would be to injure the reputation of the Plaintiffs' machines.

The bill prayed that the Defendant might be restrained from advertising or otherwise using the name of "*Singer*" as a designa-

C. A. 1876

SINGER MANUFACTURING CO. v. WILSON.

Statement.

tion of, or in connection with, any sewing machines manufactured by the Defendant, or any sewing machines sold by the Defendant, unless of the Plaintiffs' manufacture, and from selling or offering for sale, as "*Singer*" or "*Singer's*" Machines, any sewing machines which had not been manufactured by the Plaintiffs, and for an account of profits, and assessment and payment of damages.

The Defendant, by his answer, asserted that, though there might be varieties of minor details, all the machines sold by the Plaintiffs', of the class known to the public as "*Singer*" Machines, had the same characteristic combinations or combination of parts. The Defendant alleged that the term "*Singer*" Machine was understood by the trade and the public to mean a sewing machine of certain particular constructions, and did not, in the estimation of the trade or the public, designate a machine made by the Plaintiffs or their predecessors, but was merely descriptive of any machine, by whomsoever made, of the particular construction, and the Defendant alleged that the Plaintiffs also made and sold other machines of a totally different construction.

It appeared that the Plaintiffs had for some years before the filing of the bill affixed to their machines a device consisting of a shuttle and needles, crossed with a line of cotton in the form of the letter S. This device was placed in the centre of an ellipse. Immediately under the device were placed the words "Trade Mark." Over it, just inside the ellipse, were placed the words "The *Singer M. F. G. Co. N. Y.*" Outside the ellipse and underneath it appeared the words "Registered Trade Mark." They also marked their machines in large letters with the words "The *Singer Manufacturing Company.*" In their price lists and advertisements, since the adoption of this trade-mark, the Plaintiffs printed a copy of the above device, and stated, "No machine sold as the '*Singer*' is genuine without this trade-mark fixed to the arm."

The Defendant did not place the word "*Singer*" on his machines. Every machine sold by him had attached to it, in a conspicuous place, a brass plate bearing the device of *St. George* and the Dragon, surrounded by the words "*Newton Wilson & Co.*, Manufacturers, 144, *High Holborn.*" He admitted that he was manufacturing and selling machines, not of the Plaintiffs' manufacture, as "*Singer*" Machines, and that in his price lists

he had described them as "Our '*Singer*' Machines," and that he had given directions to his travellers and salesmen so to describe them, but he said that in all his price lists (which comprised several classes and varieties of machines formerly patented, and of which the patents had expired, including the "*Wheeler & Wilson*," the "*Grover & Baker*," the "*Singer*," and the "*Howe*") it was expressly stated that the machines sold by him were manufactured by him, and he submitted that he was entitled to do this.

The Defendant filed a concise statement and interrogatories, to which the Plaintiffs put in an answer. In this answer the Plaintiffs admitted that in December, 1863, letters patent were granted in *England* to one *Newton* for improvements in sewing machines, and were obtained for a communication from abroad by *J. M. Singer*, and for his benefit, and that in the specification filed under that patent it was stated that "sheet 1, figure 1, shews in elevation an ordinary '*Singer*' Machine fitted with a novel arrangement," as therein mentioned. The Plaintiffs, however, went on to say that this language was not accurate, and that the designation "*Singer*" Machine did not then or at any time apply to any particular construction of machine, but had been always used and known as the general designation of any machine manufactured by the Plaintiffs or their predecessors in business, including a great number of machines of different construction. The Plaintiffs also admitted that between 1867 and 1869 they published a catalogue, entitled "The *Singer Manufacturing Company*, Proprietors and Manufacturers of the World-renowned *Singer* Sewing Machine," but they said that the word "*Singer*" was not used there as descriptive of a particular class of sewing machine, but as designating the Plaintiffs as the makers thereof, and that the only peculiar characteristic of the "World-renowned Sewing Machines" was the fact that they were manufactured by the Plaintiffs, to which they owed their renown.

The Plaintiffs adduced evidence, shewing that they made a number of sewing machines which were substantially different from each other in their construction, not possessing in common any characteristic combination or combinations, and that all their machines were known to the trade and the public as "*Singer*" Machines, simply as having been made by the Plaintiffs or their

C. A. 1876 — SINGER MANUFACTURING CO. v. WILSON. — Statement.

predecessors in business. Affidavits were made by a number of persons who had purchased sewing machines from the Plaintiffs, stating that they always understood by the term "*Singer*" Machine a machine manufactured by the Plaintiffs or their predecessors, and not a machine of any specific construction. The Plaintiffs also attempted to shew that persons going to the shops of the Defendant to purchase machines had been deceived by representations that the machines sold there were manufactured by the Plaintiffs, and that the Defendant had placed labels on his machines which described them as "*Singer*" Machines. The Court, however, held that no case of this kind had been proved.

Advertisements and price lists of the Defendant were proved, in which he professed to sell "*Singer*" Machines, but he had at the same time always stated that they were manufactured by himself, sometimes also describing them as "New *Singer's*," or "*Singer's*" with improvements of his own, and stating also that his machines were superior to those of any other manufacturer.

The cause came on for hearing before the Master of the Rolls on the 13th of December, 1875.

Argument.

Sir *J. Holker*, A.G., *Southgate*, Q.C., *T. Aston*, Q.C., *Hemming*, Q.C., *Macrory, and J. Rigby*, for the Plaintiffs.

Fry, Q.C., *Bidder*, Q.C., *Everitt*, and *W. N. Lawson*, for the Defendant, were not heard, the Master of the Rolls saying at the close of the Plaintiffs' case that, being of opinion that on their own evidence, read without cross-examination, the Plaintiffs had failed, he should give judgment in the nature of a nonsuit.

Judgment, M.R. JESSEL, M.R.:—

The case made by the Plaintiffs, as I understand it, is a very simple one. They are a great manufacturing company of sewing machines, and they are called the *Singer Manufacturing Company*. Their case is that for many years they have been in a large way manufacturers of sewing machines, that the sewing machines manufactured by them have been described as "*Singer*" Machines, or "*Singer's*" Machines, and that those words do not import, and were not generally understood to import, any specific principle of

construction or mechanical arrangement of working parts, or any one type of machine, but simply that the machines so designated are of the Plaintiffs' manufacture. They go on to say that by means of advertisements and otherwise, their manufactures are well known throughout the world as "*Singer*" or "*Singer's*" Machines, and that the name "*Singer*" has become, and is a trade-mark of the Plaintiffs.

I will pause here for a moment to say that the Plaintiffs have a trade-mark properly so called, that is, a mark or device affixed to the machines they sell, and they have in all advertisements and price lists that I have seen (of course I cannot speak of those I have not seen), but in all those that they have thought fit to hand up to me, they very fairly describe that as a trade-mark. I will read it from one that is before me at the present moment. "Illustrated Price Lists of the *Singer* Manufacturing Company's New Family Machines"; "Sole Proprietors and Manufacturers of the *Singer* Sewing Machines for every class of Needlework"; "Copy of the Company's Trade-mark plate affixed to the arm of every machine, without which none are genuine." Then there is the trade-mark, which is a shuttle, with what I suppose is intended to represent a reel of thread, and two cross lines, which I suppose are intended to represent needles. That is their trade-mark, and it is surrounded by this device: "The *Singer* Manufacturing Company," in large letters, with the words "Trade Mark" below, and then there are some flowers. It is a very distinctive trade-mark indeed, so that they let the public know, and they let everybody know, that nothing is genuine without that trade-mark, and anybody who saw their price lists must see that that is their trade-mark. Therefore, when they say that the use of the word "*Singer*" has become and is a trade-mark of the Plaintiffs, it is said in some extraordinary and unusual sense of the word "trade-mark," they having a proper trade-mark, which is one very well known.

Then the bill contains the following allegation:—"The machines made by the Plaintiffs have acquired a very large reputation, and by reason of such advertisements as aforesaid have become very widely known both by the trade and by the public, and the Plaintiffs and their predecessors in the said business have for many years past carried on an extensive trade in such machines, and

C. A. 1876

SINGER MANUFACTURING CO. v. WILSON.

Judgment, M.R.

have from the first commencement of the said business uniformly described and advertised their machines as "*Singer*" or "*Singer's*" Machines." The Plaintiffs complain that the Defendant, who is a sewing machine manufacturer, has manufactured and sold to the public sewing machines not of the Plaintiffs' manufacture, and has on his price list described such machines as, and has given to his salesmen and travellers directions to describe and sell such machines as, "*Singer*" or "*Singer's*" Machines; and they say that that course of business "is calculated to mislead and has misled purchasers into the belief that the machines offered for sale by the Defendant are machines of the Plaintiffs' manufacture."

Then they ask the Court to restrain the Defendant "from advertising or otherwise using the name of "*Singer*" as a designation of, or in connection with, any sewing machines sold and manufactured by the Defendant, or any sewing machine sold by the Defendant, unless of the Plaintiffs' manufacture, and from selling or offering for sale any sewing machines as "*Singer*" machines, or "*Singer's*" machines, which have not been manufactured by the Plaintiffs." Therefore that injunction is asked quite irrespective of the Defendant telling his customers that it was not manufactured by the Plaintiffs. One of the learned counsel wanted to press me to enter into a line of evidence not covered by the first paragraph of the prayer, and not intended, as I thought, to be covered by the bill. I was relieved from considering that, because the Attorney-General said he did not want to go further than that prayer, and that he wanted the general question decided whether he was entitled to the injunction as asked by that prayer, namely, to restrain the Defendant from offering for sale any sewing machine as "*Singer's*" or the "*Singer*" machine, whether he said it was made by himself or not.

The view I take of the law is, that nothing can be better established, and nothing ought to be otherwise than fully established in a civilized country, than this, that a manufacturer is not entitled to sell his goods under the false representation that they are made by a rival manufacturer. That is the principle: the difficulty has arisen in determining what amounts to such false representation.

The cases which have come before the Courts, may, I think, be

conveniently divided into two classes; the first class, which is the more numerous one, consists of cases where the goods manufactured are distinguished by some description or device in some way or other affixed to the article sold. It may be, as I said before, description—that is, it may consist of a name or names, or a lengthy description consisting of names with superadded words, and that description may be either affixed to, or impressed upon, the goods themselves by means of a stamp or an adhesive label, or it may be made to accompany the goods by being impressed or made to adhere to an envelope or case containing the goods.

An illustration of the first class would be the common trade-mark, which is either the name or the image of some known or unknown thing, actually impressed upon or worked into the material, or made to adhere to the surface of the material, or it may be not what is commonly known as a trade-mark, a distinguishing mark which, perhaps, to a legal mind, would be a trade-mark, but some form of the material itself.

I will give as an illustration a case which was recently before me, where, on some cloths which were exported abroad, it was said that certain lines in the hem, or fringe, of the cloth of various colours were understood, in the *Brazils* in the one case, and in *Turkey* in another case, to shew that they were the goods of a particular manufacture. All that comes under the general notion of a trade-mark, which is a mark which shews that the goods are made by some particular maker.

Sometimes you do not find anything put on the goods themselves, the reason often being that the goods are not capable of it; for instance, when there are liquids, upon which of course you cannot put a mark, and therefore a mark is put on the bottle containing the liquid, or on the cork which is in the bottle and helps to retain the liquid. These are again true trade-marks, whether affixed in the shape of a label on a bottle of liquid or in the shape of a device on the cork, or in the case of other goods, such as cigars, affixed to the box which contains the cigars or the string which encircles them, they are in some way or other attached to the goods, and go along with the goods on sale. That I call the first class.

Now, as to this class, it is quite immaterial that the maker of the goods to which, what I will call for the sake of shortness, the trade-

C. A. 1876 SINGER MANUFACTURING CO. v. WILSON. Judgment, M.R.

mark, is affixed, did not know that it was a trade-mark, and had not the slightest intention of defrauding anybody. He must not put as a mark on goods, even though he intends to establish it as his own trade-mark, that which is the known trade-mark of other people, and he would be restrained by injunction though he thought he himself had invented the trade-mark and *bonâ fide* intended it to designate goods of his own manufacture. And the reason is obvious, because the goods pass from hand to hand, and though he may act with the utmost *bona fides*, yet the ultimate purchasers might believe that they were the real goods, that is to say, that they were manufactured by the person entitled to the original trade-mark. Therefore, in that case, knowledge that he is doing anything wrong is immaterial even in the maker.

Another element which is sometimes imported into these cases has also no material bearing; that is, that if the maker knows that they are not the goods of the person entitled to use the trade-mark, and communicates that knowledge to the immediate purchaser, it makes, as I have said, no difference, and even if he does not know it, and tells the immediate purchaser that the goods are of his own manufacture, it will still not save him from an injunction, because, although the immediate purchaser from him is aware that the goods in question are not manufactured by any other person than the vendor, yet, as he passes them on, the representation does not necessarily pass on with them, and therefore the next purchaser, or the following or some other purchaser, or the public at large who are the ultimate purchasers, would be as much deceived as if no such communication took place. Consequently, whenever you get to a case of the first class, you have nothing more to do than to shew that the trade-mark has been taken.

What do we mean by saying that the trade-mark has been taken? That, again, has given rise to a great variety of decisions, but the principle, I think, is clear. A trade-mark, to be taken, need not be exactly copied; it need not be copied even with slight variations; but it must be a substantial portion of the trade-mark. It has sometimes been called the material portion, but that means the same thing; it means the essential portion of the trade-mark, and it is sometimes a very difficult thing for a Judge to say what is the essential portion of it. As to that, no doubt authorities are

useful. It must depend on the nature of the articles, and on the nature of the trade-mark also. Of course, where the trade-mark is very special, or peculiar in one respect, and is unlike any other trade-mark in the world; if it had, for instance, the portrait of a fanciful animal such as we are familiar with in heraldry, or one which no human being had ever thought of before, if it was a new animal invented for the purpose of the trade-mark, then, even though it was accompanied by other *indicia* making up the trade-mark, I think very few Courts would doubt that the man who put the fanciful animal on goods of the same description or quality would invade the rights of the original owner of the trade-mark. I only put that as an illustration; many others will present themselves to the minds of the gentlemen of the Bar who are familiar with the subject. Therefore, what the Court has to satisfy itself of is, that there has been an essential portion of the trade-mark used to designate goods of a similar description. I say of a similar description, because there is no right in a trade-mark except to protect the manufacturer of the goods. If a seller of carriages invented this fanciful mark, this curious animal, and put it on carriages, that would not prevent a manufacturer of woollen goods from putting it as a trade-mark on woollen goods. As I said before, you must have regard, not merely to the mark, but to the nature of the goods upon which the mark is impressed. That being so, I think I have disposed of the first class of cases.

The second class of cases are cases of a totally different character: they are always cases of fraud. They are cases where the Defendant, without putting any trade-mark at all on his goods, or putting a trade-mark which is admittedly different in substance from the trade-mark, if any, of the Plaintiff on the goods, has represented the goods as being goods manufactured by the Plaintiff. Here, again, the Court has to try the question of representation. What the Defendant has said or has done must amount to a representation that the goods to be sold are the goods of the Plaintiff, or that they are manufactured by the Plaintiff. What amount of representation will be sufficient for that purpose must again depend, of course, on the facts of each particular case; but there are one or two things which I think may guide the Court in arriving at a conclusion.

C. A. 1876 SINGER MANUFACTURING CO. v. WILSON. Judgment, M.R.

13 Ch D 406

First, has the representation in question been accompanied by a trade-mark on the goods? If there is a distinct and obvious trade-mark, of considerable size, and which ought to be noticed by any reasonable purchaser, shewing that the goods in question are goods manufactured by the man who sells them, it is very strong evidence in favour of his *bona fides*. It seems to shew that he could not have intended to deceive, or he would not have taken so much trouble to have marked his goods in a plain and easily recognisable manner as being manufactured by himself.

Again, if he tells the purchaser in plain English that the goods, however described, are in fact manufactured by himself, and makes this statement again in an open and full manner—that is, he does not use a small type for the one statement and a large type for the other, and does not do anything which shews an intention to deceive, but openly and fairly states all the circumstances—then it appears to me you have a very strong indication to shew that he did not intend to deceive, and that no reasonable person ought to have been deceived, although, if he had used one or more of the terms he has used without that explanation, he might have been liable to a charge of misrepresentation. But, as in every other case of fraud—for it must be fraud—the case must be proved. I say it must be fraud, because in the second class of cases the Defendant knows two things: he knows the goods were manufactured by himself and not the Plaintiff, and he knows the representation he is using is to convey to the mind of the purchaser (when I say he knows it, if it is reasonably calculated to convey, he must know the meaning of language so reasonably calculated to convey the idea) a contrary impression, that is a distinct and direct fraud; and I go further, and although it is no part of my business to decide on morals, yet as we often talk of legal fraud, perhaps irregularly and improperly, as distinguished from moral fraud, that appears to me to be moral fraud, and moral fraud of a very gross character, because he knows the facts, and knowingly misrepresents them to induce a man to buy as goods manufactured by somebody else, goods manufactured by himself.

Now, if there is anything in this case at all, it is a case of the second class. The Plaintiffs, as I said before, have very distinct trade-marks indeed, which I have described. The Defendant has

also a distinct trade-mark, very distinct indeed, which is put on his machines of a fairly considerable size, and as far as I can see, of the same size as the trade-mark which the Plaintiffs put on their machines. If it differs, it differs so minutely that I have not been able to appreciate the difference. It is of brass like theirs, and it is very distinctive, "*Newton Wilson & Company*, Manufacturers." There is then a St. George and a Dragon and the word "Trade-mark," and 144, *High Holborn, London.* If that trade-mark has any meaning at all with the use of the word "Manufacturers," it means that *Newton Wilson & Co.* are the manufacturers of the article upon which this brass plate is affixed. I so read it, and I think any intelligent person would so read it also, and I am gratified so far to find from the evidence that whenever the attention of any of the witnesses was called to this brass plate, they at once recognised the fact that it was a representation that *Newton Wilson & Co.* manufactured that article.

Again, I have seen the machines, and in my opinion any ordinary purchaser looking at the machines ought to have seen that brass plate upon them. That, again, is a question which I must decide for myself as a jury, and in my opinion trade-marks, being made for those who have ordinary sight and ordinary minds, and not being made for persons of extraordinary acuteness or extraordinary dulness, I think there is on every machine sold by the Defendants a fair and reasonable notice, not calculated to mislead any one, that the machines sold by them with that mark affixed to them are manufactured by the firm of *Newton Wilson & Co.*

But that is not all. The Defendant has issued a price list, and it is on the price list that the great argument turns. It was said that, however the machine might have been standing alone, the Defendant has issued a list of prices to the public which shewed that he sold "*Singer*" Machines, or in other words, that he sold machines manufactured by the Plaintiffs. Well, if he did that, if he represented to the public that the machines which he knew were manufactured by himself, were manufactured by the Plaintiffs, of course he would be liable.

When I come to look at the Defendant's price list, I find this, that it is "*Newton Wilson & Co.'s* Price List," and I find in type, fairly the same for this purpose throughout, that is, down to the

C. A. 1876 — SINGER MANUFACTURING CO. v. WILSON. — Judgment, M.R.

material words in the middle of the second page, this passage which I am going to read: "Treadle Machines, for family and manufacturing use, on the various well-known American systems, and manufactured by us under their expired patents, but in some cases with patented improvements of our own, and with a finish and perfection that is unapproachable, as follows." Then there comes the "*Wheeler & Wilson* Bronze Machines," and then various other *Wheeler & Wilson* machines; then the "*Grover & Baker* Machine No. 2"; then there are various other *Grover & Baker* machines; then there is the "*Singer* Family Machine, *F. A.*"; then there are two more *Singer* machines, the "Medium Machine, *F. E.*," and two more manufacturing machines. Then comes the *Howe*, three kinds of machines with some variations, and that ends this list. So that you have in this price list, following a long list, which I did not read, of *Newton Wilson & Co.'s* ordinary machines, that is, of no particular name, but made by themselves, these machines on the various well-known American systems.

Reading this, what do I find? I find it stated as distinctly as English can state it to my mind, that, whatever these things are called by the Defendant, they are manufactured by himself. He tells the public in the same breath, if I may say so, but on the same sheet certainly and literally on which he uses the name complained of, that, whatever it may mean to the public when used alone, he uses it to describe a machine made on the American system by himself, "manufactured by us." He then says, "they are manufactured with improvements not to be found in the things manufactured by other people." The argument before me was this: it is said he has described amongst the machines manufactured by himself a machine which he calls the "*Singer*" Family Machine, which, standing alone, means a machine manufactured by the Plaintiffs. But the answer is simple—that it does not stand alone. He says, "I call it so because it is on a well-known American system," the "*Singer*" being, amongst others, originally an American manufacturing company; and it does appear from the evidence that, although the "*Singer*" Machine cannot be described as confined to a patented machine, or even perhaps to machines of a particular and precise description, as distinguished from every other machine, yet there are some particulars about the "*Singer*"

machines which are recognised as regards form, shape, and mechanical contrivance which not unfairly might be used as a distinction.

To illustrate what I mean, I will take another class of cases altogether. Suppose we have wines. You have a wine which is a manufactured wine, say champagne, not a natural wine at all. You have *Moet's* champagne, *Pommery & Greno's* champagne, *Röderer's* champagne, or any other makers of champagne. Their champagnes are known throughout the world as excellent wines in their way. Another man sets up as a champagne maker, not in *France* but in *Germany*, and manufactures a wine now well known in the market called German champagne. He sends out circulars, and he says, "I manufacture champagne wine from *Rhine* grapes, and I manufacture them at *Frankfort*. They are very good wines, and they are manufactured on the well known French systems, and are manufactured in some cases with improvements of my own, and with a finish and perfection which is unapproachable. They are as follows:—the *Moet* champagne, No. 1; the *Pommery & Greno* champagne, No. 2; and the *Röderer* champagne, No. 3." Could anybody say that a person reading that statement would buy that man's champagne as being the genuine champagne made in *Champagne* by the various makers I have named? I am not, as I consider, to decide cases in favour of fools or idiots, but in favour of ordinary English people, who understand English when they see it, and are not deceived by any difference in type, but who have before them a very plain statement. It does seem to me that neither Messrs. *Moet*, nor Messrs. *Pommery & Greno*, nor Messrs. *Röderer*, would have any right to complain that a manufacturer of champagnes, in honour of them, and to shew that he had nearly approached their flavour, or that he had, in his own opinion, improved upon it, had described his wines in that way, not putting anything of the kind on the bottle, but the German manufacturer putting on the bottle his own name, let us say *Grapheim*, so that everybody would know they were his wines, although he had stated in the circular that they were rather better than *Moets*, *Pommery & Greno's*, or *Röderer's*, and so had distinguished them by such description.

That appears to me to be the present case; and I am of opinion

C. A. 1876 — SINGER MANUFACTURING CO. v. WILSON. — Judgment, M.R.

that the Plaintiffs are mistaken in saying that they have any right to prevent the Defendant using their name in this way, that is, the name of the machine, when he does not use it for any other purpose than, as far as he is concerned, to shew that it is a kind of machine manufactured by him.

Therefore, in my opinion, the Plaintiffs' case fails; and it is my duty to dismiss the bill with costs.

A decree was accordingly made by which, after reciting that the Court was of opinion that the Plaintiffs had failed on their own evidence, read without cross-examination, the bill was dismissed with costs; the Defendant's evidence being entered for the purposes of costs only, and not as having been read.

C. A.

The Plaintiffs appealed, and the appeal came on for hearing on the 21st of March, 1876.

Argument.

Southgate, Q.C., *J. Aston*, Q.C., *Hemming*, Q.C., and *J. Rigby*, for the Plaintiffs:—

Where a name is the name of a manufacturer, another person cannot call his own manufacture by it, for the doing so amounts to a representation that it is made by the other person, though the case is not the same as to the use of the name of an inventor, for there nobody can be misled. Suppose a person goes into a pianoforte warehouse and says, "Sell me a *Broadwood*." Can the dealer sell him anything but a piano made by *Broadwood?*

[JAMES, L.J.:—Have you any authority in your favour, if there is no label or mark affixed to the goods sold?]

There are *dicta* by Lord *Hatherley* in the *Glenfield Starch* case, *Wotherspoon* v. *Currie* (1); and surely there is no Statute of Frauds to make writing necessary in such a case. The order of the House of Lords in that case restrained the use of the word "*Glenfield*," not only on the label, but also in advertisements, which entirely disposes of the distinction taken by the Master of the Rolls. The Defendants misapprehend a remark of *James*, L.J., when Vice-Chancellor, in the *Wheeler & Wilson Company* v. *Shakespear* (2), which, moreover, was only a *dictum*, and does not

(1) Law Rep. 5 H. L. 508. (2) 39 L. J. (Ch.) 36.

apply to this case, because on the evidence read the word "*Singer*" does not point at any particular type of machine, but simply at the manufacturers. *Edelsten* v. *Vick* (1) related to an expired patent in the name of *Taylor*, not to the mere use of a manufacturer's name. *Ainsworth* v. *Walmsley* (2) and *Wotherspoon* v. *Currie* (3) are in our favour.

[JAMES, L.J.:—The last would have been a valuable case for you if the name "*Singer*" had been placed on the Defendants' machines.]

It has been said that there is no property in a name: *Clark* v. *Freeman* (4); but Lord *Cairns*, in *Maxwell* v. *Hogg* (5), doubts that rule. *The Singer Company* v. *Kimball* (6) is a decision by the Scotch Courts in our favour under circumstances exactly similar to those of the present case. There the Court found that the name "*Singer*" had been in the sewing machine trade used and appropriated exclusively to designate and identify the sewing machines made by us, and granted a perpetual interdict against the use of the name "*Singer*" by the Defendants, though the Defendants in that case had, equally with the present Defendants, stated in their advertisements that the "*Singer*" machines which they sold were manufactured by themselves. Could a man be allowed to sell ale manufactured by himself under the name of *Bass's* ale or *Allsopp's* ale, if he took care to place on his bottles labels different from the labels of those brewers?

[JAMES, L.J.:—The question is, whether the Defendant acts in such a way as to lead the public to believe that he is selling machines made by you.]

The machines made by us have become known to the public as "*Singer*" machines, and the necessary result of the Defendant's using that word will be to induce unwary persons (who are the very persons whom the Court interferes to protect) to believe that he is selling machines made by us. In the *Eureka Shirt* case, *Ford* v. *Foster* (7), the article manufactured always preserved

(1) 11 Hare, 78.
(2) Law Rep. 1 Eq. 518.
(3) Ibid. 5 H. L. 508.
(4) 11 Beav. 112.
(5) Law Rep. 2 Ch. 307, 310.
(6) 11 Court of Ses. Cas. (3rd Series), 267.
(7) Law Rep. 7 Ch. 611.

C. A. 1876

SINGER MANUFACTURING CO. v. WILSON.

Argument.

its identity; the character of the machines which we make is continually changing, but the high quality of our workmanship remains, and it is that which has been the means of giving a reputation to "*Singer*" machines. The Defendant is in effect seeking to appropriate to himself the benefit of that reputation, and all the authorities shew that the Court will interfere to restrain such a course of dealing. The Court has often interfered to protect the use of a mere fancy name; *à fortiori*, manufacturers ought to be protected in the use of their own name. The judgment of Lord *Langdale* in *Perry* v. *Truefitt* (1) shews the principle on which the Court acts; no man has a right to use the mark or name already used by another manufacturer for the purposes of deception. This was approved by Lord *Hatherley*, when Vice-Chancellor, in *The Collins Company* v. *Cowen* (2). Using a name in advertisements may deceive. In the case of the *Excelsior* soap, *Braham* v. *Bustard* (3), the Defendants were restrained from using the word "*Excelsior*" as applied to soap, although they placed their own names before it. In *Wotherspoon* v. *Currie* (4) the Defendant, though his manufactory was at *Glenfield*, was not allowed to use that word as applied to the starch which he made, and which on the label itself he described as his own.

[MELLISH, L.J:—There the Defendant stated a nominal truth which really amounted to a deception.]

That is the case here. In *Hall* v. *Barrows* (5) Lord *Westbury* laid it down distinctly that there is a right of property in a trademark, and that the interference of the Court is based on that right of property. If, instead of calling our machines "*Singer*" machines, we had called them by a fancy name, such as "*Excelsior*," *Wotherspoon* v. *Currie* would have exactly applied. It is enough to support our case if the public will probably be deceived by the Defendant's acts: *Shrimpton* v. *Laight* (6).

[They referred also to *Croft* v. *Day* (7); *Cocks* v. *Chandler* (8); *Burgess* v. *Burgess* (9).]

(1) 6 Beav. 66, 73.
(2) 3 K. & J. 428.
(3) 1 H. & M. 447.
(4) Law Rep. 5 H. L. 508.
(5) 4 D. J. & S. 150.
(6) 18 Beav. 164.
(7) 7 Ibid. 84.
(8) Law Rep. 11 Eq. 446.
(9) 3 D. M. & G. 896.

Fry, Q.C., *Everitt*, and *W. N. Lawson*, for the Defendant, were not called upon.

C. A. 1876 SINGER MANUFACTURING CO. v. WILSON. Judgment, C. A., James, L.J.

JAMES, L.J.:—

Notwithstanding the very great length of time which this case has occupied, and with all deference to the very eminent Judges in *Scotland* who pronounced a decision, apparently in a similar case, in favour of the Plaintiffs, I should myself have thought that, according to all the cases in *England*, and according to the law as laid down in the Courts both of Law and Equity, this was a remarkably clear and simple case. The law as laid down by the Master of the Rolls seems to me to be quite right, that there are two distinct things known to us in dealing with these cases; that is to say, in the first place there is the imitation of a trade-mark proper, which is different from other modes of false representation; and, secondly, there is the false representation by which a man induces the public to believe that the goods which he is selling are the goods of another person—that is to say, he is passing off his goods as the goods of another person. But fraud is of the essence in both cases. The case of trade-mark differs to this extent and in this respect from that of mere representation, that the trade-mark is capable of being used for the purpose of deception, not only as between the immediate vendor and the immediate purchaser, but by any subsequent person into whose hands the thing may fall; and therefore it is that it has been said that there is a property in the trade-mark itself in the nature of copyright, by which is meant, that when a person has used a trade-mark, whether it be his own name, or an animal, or a dot, or a point, or anything else, to distinguish his goods, nobody else has a right to put a copy of that mark (any more than he would have to pirate a book) upon the goods which he sells, or anything containing them, such as a wrapper, a label, or anything which can go with the goods into the market; because, although as between the first vendor and purchaser there may be no fraud, the mark is capable of being used for the purpose of fraud afterwards. Therefore the Court says, for the purpose of preventing the fraud at once, You shall not put that mark upon your goods, or connect it with your goods, if it be the trade-mark of somebody else. That

C. A. 1876

SINGER MANUFACTURING CO. v. WILSON.

Judgment, C. A. James, L.J.

is the simple case of a trade-mark. But when it is not a case pure and simple of trade-mark, it must, as I have always understood the law, depend upon actual fraud; that is, the Defendant must be shewn to have said or done something which, as between him and the person with whom he was dealing, amounted to a fraudulent representation that his goods were the goods of the person who is complaining of his act or word. Actual fraud must be proved. It is necessary, therefore, that we should see exactly what the Defendant has done in this case. Well, he has not put upon the articles which he sells anything which is part or parcel or an imitation of any trade-mark of the Plaintiffs. He has copied no trade-mark of theirs. There is nothing brought home to him, as I read the evidence, except his own trade circulars and advertisements. There was an attempt to shew that at a shop of his in *Dublin*, and at another shop of his in *London*, a label which contained the word "*Singer*" was placed on his machines; but that was not put in issue by the bill, and the evidence of it is to my mind in no degree satisfactory, for if a label had been used in that way it would have been proved in a different manner. We come, then, to the advertisements. Now, of course, advertisements are intended for people who can read, and trade circulars are also intended for people who can read; they are not things calculated to deceive unwary purchasers as a trade-mark might do; they are not calculated to deceive some subsequent person into whose hands the goods may fall; but they express in clear terms to the man who can read them that which they are intended to express. I find one specimen, and it seems to me to shew exactly all that the Defendant has done, both in his trade circulars and in his advertisements. It is to this effect: "*Newton Wilson & Co.'s* Patent *Singer* Sewing Machines; *Newton Wilson & Co.'s* sewing machines are the only patented machines of this class; *Newton Wilson & Co.'s* machines have special improvements over any other make, English or American, of this machine. Buy no machine until you have inspected *Newton Wilson & Co.'s* Patent *Singer*. See that *Newton Wilson & Co.'s* trade-mark, the *St. George* and Dragon, is on the machine you purchase. Apply for further particulars" —and then they mention several places at which people are to apply. Now it appears to me utterly impossible that any man or

woman capable of reading could suppose from such an advertisement that *Newton Wilson* is representing his machine as being the machine manufactured by the *Singer Manufacturing Company*. In his trade lists which are sent out to persons in the trade, and of course equally to persons who are capable of understanding what is said, the Defendant gives the same plain and clear description and statement, that the thing which he sells is the manufacture of *Newton Wilson & Co.* That being so, I can see no evidence whatever of any fraud, and there are no means put into the hands of any persons whatever to commit a fraud or to assist in committing a fraud. I agree with the Master of the Rolls in the conclusion to which he has come, that the Plaintiffs' case has wholly failed; they have failed to convict the Defendant of having made any fraudulent representation with regard to his goods.

MELLISH, L.J.:—

Mellish, L.J.

I am of the same opinion. In order that this suit may be maintained against the Defendant, it must of course be proved that he has done, or has threatened to do, some act which would be wrongful, as between him and the Plaintiffs, and which ought to be restrained. We must consider, then, what is the wrongful act which they have proved to have been done. Has he wrongfully used the Plaintiffs' trade-mark, or has he falsely represented that the goods which he sells are goods manufactured by the Plaintiffs? Now, in my opinion, all actions of this nature must be founded upon false representations. Originally, I apprehend, the right to bring an action in respect of the improper use of a trade-mark arose out of the common law right to bring an action for a false representation, which, of course, must be a false representation made fraudulently. It differed from an ordinary action for false representation in this respect, that an action for false representation is generally brought by the person to whom the false representation is made; but in the case of the improper use of a trade-mark, the Common Law Courts noticed that the false representation which is made by putting another man's trade-mark, or the trade name of another manufacturer, on the goods which the wrongdoer sells, is calculated to do an injury, not only

C. A. 1876

SINGER MANUFACTURING CO. v. WILSON.

Judgment, C. A. Mellish, L.J.

to the person to whom the false or fraudulent representation is made, but to the manufacturer whose trade-mark is imitated; and, therefore, the Common Law Courts held that such a manufacturer had a right of action for the improper use of his trade-mark. Then the Common Law Courts extended that doctrine one step further; first, if I recollect rightly, in the case of *Sykes* v. *Sykes* (1). There it was held, that, although the representation was perfectly true as between the original vendor and the original purchaser, in this sense, that the original purchaser knew perfectly well who was the real manufacturer of the goods, and, therefore, was not deceived into believing that he had bought goods manufactured by another person, yet if the trade-mark was put on the goods for the purpose of enabling that purchaser, when he came to resell the goods, to deceive any one of the public into thinking that he was purchasing the goods of the manufacturer to whom the trade-mark properly belonged, then that was equally a deception, a selling of goods with a false representation, which would give the original user of the trade-mark a right of action. That was the common law right. Then in *Millington* v. *Fox* (2) the Court of Chancery extended the right still further. To give a right of action at common law, the thing must have been done fraudulently, it must have been intended to deceive. But the Courts of Equity said, If you have purchased goods with another man's trade-mark upon them, although you may have done it perfectly honestly, not knowing that it was another man's trade-mark, or if you have manufactured goods for somebody else, who has ordered you to manufacture them with a certain trade-mark upon them, and you have manufactured the goods with that trade-mark upon them, perfectly honestly, and not knowing that you were doing anything wrong in putting that trade-mark upon them, yet, nevertheless, you cannot be allowed to put the goods into the market with that trade-mark upon them, because the effect of it will be that the goods will pass from hand to hand as being goods manufactured by the person whose trade-mark it is; and, therefore, you shall be restrained from doing that. The Courts of Equity having taken that step, trade-marks began to be considered as property, and no doubt there is in a certain sense a property in a trade-mark, and

(1) 3 B. & C. 541. (2) 3 My. & Cr. 338.

equally in a trade name, because a trade name may be used, and is very commonly used, as a trade-mark properly so called—that is, a mark put upon the goods themselves. Then both a trade-mark and a trade name were allowed to be sold as part of the goodwill of a business. When a new partner came into a mercantile firm, amongst other rights which he purchased by coming into that firm was the right to use the trade name or trade-marks belonging to that firm. Even when an entire business was sold to a new purchaser the right to use the trade name and trade-marks passed with it, and in that sense they became property. But, so far as I know, there is not one single case in *England* in which it has been held that you can maintain an action or a suit in respect of the improper use of a trade name or a trade-mark unless there is a false representation. Of course there is this material distinction between cases of trade-mark and cases simply of advertisement, because when a trade-mark, whether it be a trade name or not, is placed by a manufacturer on the goods themselves or upon a wrapper which is fixed round them, if that mark is used by another manufacturer, that is, of course, calculated to deceive any one into whose hands the goods come with the mark upon them. Therefore, in such a case, the Court has to consider whether an unwary purchaser might be deceived. But, when there is nothing wrong put upon the goods themselves, the simple question is, has the person to whom the representation is made been deceived, because, of course, if the person to whom the representation is made is not deceived, and nothing is put on the goods themselves which can deceive, then nobody is deceived; and, in my opinion, if nobody is deceived, no wrongful act is committed. Now, in the case in the Scotch Court, the Judges seem certainly to have proceeded upon a general principle, founded upon some expressions of Lord *Westbury* in the *Glenfield Starch* case, *Wotherspoon* v. *Currie* (1), that there is a property acquired in a trade-mark or trade name to this extent, that no one else is entitled to use that mark or name at all as applied to the particular article in connection with which it has been used, even though he does it perfectly honestly and in a way not calculated to deceive; that the man who has first used the name is entitled to say, You

(1) Law Rep. 5 H. L. 508.

C. A. 1876

SINGER MANUFACTURING CO. v. WILSON.

Judgment, C. A. Mellish, L.J.

shall not use the name at all as applied to goods like mine, it will do me harm if you use it in that way, and you shall not use it at all. The Scotch Court has gone to that extent, and that, of course, is departing altogether from the principle that the right to prevent the use of a trade-mark or trade name is founded on deception and false representation. It carries the doctrine that there is a property in the name or mark much further than it has ever been carried before. You first say the right to use the name or the mark can be made the subject of purchase, and, therefore, it is a property, and then you proceed to draw the further inference, that, as it is a property, whether it is used in a way calculated to deceive or not, you can prevent any one else from using it. That, to my mind, would be going further than the English Courts have ever gone, and it appears to me that the Court ought not to go to that extent, for this reason, that, although it is perfectly right to protect the use of trade-marks and trade names, yet it is impossible not to see that persons do try to use their right in trade-marks and trade names for the purpose of getting a monopoly in particular articles, just as if they had a patent for the goods which they manufacture. When, however, they have not any patent, other manufacturers are entitled to make the same goods, and are entitled to tell the public that they are copying the very thing which the original manufacturers make. Now, in my opinion, it is impossible to read the Plaintiffs' advertisements without coming to the conclusion (not that they have done anything wrong, or that they have said anything that is false, or that they are in the least degree deserving of reprehension), but that they have gone on praising the machines manufactured by themselves in language which is calculated to make ignorant persons who read these advertisements, and who do not understand the patent laws, believe that they have got a monopoly in some particular machines, and that those particular machines cannot be purchased from any one else. And, therefore, other manufacturers, being entitled to make those particular machines, are also entitled to disabuse the public mind of that notion, and to say, There is no monopoly of those machines, we are equally entitled to make them, and we do make them. What the Court, in my opinion, has to decide is simply this—Has the Defendant gone beyond that, and

done what he is not entitled to do, viz., has he fraudulently asserted, or has he made use of expressions which are calculated to induce the public to believe, that he sells machines which are made by the *Singer Company*. That being the general principle upon which, in my opinion, this case must be decided, we have then to look at the evidence. Now, in the first place, the Defendant's machine itself, to my mind, is not calculated to deceive anybody, and Mr. *Aston* at once admitted that if the Defendant had never published any advertisement respecting the "*Singer*" Machine, and had never called his machine a "*Singer*," the Plaintiffs could not have complained of his selling that particular machine with his own trade-mark upon it. Although in a certain degree, no doubt, the Defendant's machine is shaped like the Plaintiffs', and his trade-mark is placed on the same part of the machine as the Plaintiffs', yet they never could have complained of his selling such a machine with his own trade-mark upon it, stating that it was manufactured by *Newton Wilson & Co.* It is admitted they could not complain of that. That is to say, the selling of a machine like the Plaintiffs' is not a wrongful act. Then is the publishing of the advertisements a wrongful act? To my mind that depends upon this: whether any one reading the advertisement would come to the conclusion that the Defendant sold machines manufactured by the Plaintiff company, or whether he would come to the conclusion that, by whatever name the Defendant called them, they were machines manufactured by *Newton Wilson & Co.* Well, then, looking at the Defendant's advertisements and trade circulars, he does, to my mind, say in plain terms, that all the machines he sells are manufactured by himself, and that, not only with reference to the Plaintiffs, but with reference to other manufacturers whose machines he imitates. The Defendant manufactures various descriptions of sewing machines. In his trade circulars he describes the different machines which he manufactures by the names of the manufacturers from whom he has copied them. In my opinion, nobody can be deceived by those advertisements, nor have the Plaintiffs called any witness who says that, having read the Defendant's advertisements, he was led to believe that the Defendant was the agent of the *Singer Manufacturing Company*, and sold sewing machines made by them, and that being

C. A. 1876

SINGER MANUFACTURING CO. v. WILSON.

Judgment, C. A. Mellish, L.J.

induced by those advertisements he purchased from the Defendant what he thought were their machines. That being so, no case has been made out against the Defendant simply on his advertisements. Is there, then, any case made out by the evidence which has been adduced of particular individuals who purchased sewing machines at the Defendant's shop? Now, certainly, if it is attempted to make out a case of this kind exclusively by parol misrepresentations, it must, in order to induce a Court of Equity to interfere by injunction, be proved very clearly, and, in my opinion, where the misrepresentation complained of is simply made by word of mouth, you must prove actual fraud as you would have to prove it in a Court of Law. I am not aware of any authority which says that a Court of Equity looks upon verbal representations in any different manner from that in which the Courts of Law have always done, and, in my opinion, it must be proved that they have been made fraudulently, and with an intention to deceive, in order that the Court may be able to give relief by injunction. Now, is anything of that kind really made out by the evidence which has been adduced of persons (I think there are only two or three) who say they have gone to the Defendant's shop and asked for "*Singer*" machines? That evidence is all of this kind; that some particular woman, having been told that the "*Singer*" is the best machine to have, having been told, as it is said, that a machine made by the *Singer Manufacturing Company* is the best to have, and believing, probably without any representation having been made to her by any one on the part of the Defendant, that the Defendant's shop was a place where machines of that kind were sold, goes there and asks for a "*Singer*" sewing machine, and the shopwoman delivers to her a machine with the Defendant's trade-mark upon it, which states that it is manufactured by the Defendant himself. Is it from that circumstance to be inferred that the Defendant is fraudulently endeavouring to pass off his own machines as machines manufactured by the *Singer Manufacturing Company?* In considering that question we must look at the whole of the Defendant's conduct; and when I see that in his advertisements over and over again he appears to be trying to bring his own name as the manufacturer of the machines as much as possible to the knowledge of the

public, there is not the least reason to suppose that he is shrinking from saying that he is the manufacturer of the machines which he sells. On the contrary, he is endeavouring, as far as man can do, by all the advertisements and price lists which he issues, by the trade-mark which he puts on his machines, to obtain a reputation as the manufacturer of them, saying, "The best machines you can get are those which *Newton Wilson & Co.* manufacture and sell." He seems to my mind to be *bonâ fide* trying to do that, and although I think the Plaintiffs have proved by a vast quantity of evidence of people engaged in the trade—all the persons in fact in the trade who buy from them—that they have used the word "*Singer*" as meaning a machine manufactured by the *Singer Company*, it is not proved to my mind that there may not be other persons who use the word in a secondary sense, as meaning a machine copied from those of the *Singer Company*. Looking at the facts, it is easy to see what must have happened. Here the *Singer Manufacturing Company* have, according to their own case, been for a great number of years continually improving sewing machines of different kinds, and have at last, as they say, brought them to a very great state of perfection, and they have put forth to the world that their machines are better than those of any one else, and that by great pains, great trouble, and great expenditure, they have reached the utmost perfection of manufacture in sewing machines. That they say to all the world; they advertise it to the public, and, the public believing it and buying their machines, it inevitably follows that other manufacturers will copy those machines; it is impossible to prevent it; and then, in the natural course of things, they will apply the word "*Singer*" to those machines in a secondary sense, meaning machines so called, though not manufactured by the *Singer Manufacturing Company*. It is impossible to say that the word may not be used in this secondary sense, to indicate a machine which, though not manufactured by the *Singer Company*, is copied from their machines. It appears to me that that is inevitable. It was admitted that the Defendant is entitled to copy the Plaintiffs' machines, and to call the machines thus copied "*Imitation Singers*." To my mind his advertisements practically amount to calling his own machines "*Imitation Singers*." But if he had advertised to the world that he made "*Imitation Singers*,"

C. A. 1876 SINGER MANUFACTURING CO. v. WILSON. Judgment, C. A. Mellish, L.J.

a man who wanted to buy from him a quantity of machines so manufactured, would naturally write his order in this way, "Send me 100 of your '*Singers*.'" That is the sort of language he would naturally have used. I do not, therefore, from the evidence, which shews that the Defendant's shopwoman has, in answer to a person asking for a "*Singer*" Machine, delivered a machine made by *Newton Wilson & Co.* in imitation of those made by the Plaintiffs, draw any inference that the Defendant sold the machine intending to deceive. Then the only other question raised is about the Defendant's labels. If he had put up a label in his shop stating "The '*Singer*' Machine sold here," or something like that, unqualified in any way, I should have had great doubt whether that was not a wrongful act. But, in the first place, nothing of the kind is charged in the bill, and, to my mind, there is no evidence of any such label having been ever used. I am of opinion that no action or suit can be maintained for the improper use of a trade-mark, or trade name, unless it is founded on misrepresentation by the Defendant. In my opinion there is no proof that the Defendant, though he has in some sense used the name "*Singer*," has used it so as to pass off his machines as being manufactured by the *Singer Company*.

Baggallay, J.A. BAGGALLAY, J.A.:—

Assenting entirely to the general principles applicable to the present case, which have been enunciated by the Lords Justices, and which are in fact the result of a succession of decisions of the very highest authority, I only propose to add a few observations with regard to the special circumstances of the case which is now before us. The Plaintiffs' bill has the great merit of conciseness, but although it is concise, it is also precise. There can be no misunderstanding what the equity is which is intended to be asserted, nor what is the relief which is sought. [His Lordship read the allegations of the bill above stated, and the prayer, and continued:—] I think that the equity so asserted is all that the Plaintiffs could assert, assuming the facts to be such as are stated in the bill, and what we have to consider is, whether the Defendant has done the things which are charged against him. Although the general principles of law applicable to the case have been already

referred to by the Lords Justices, I will refer to one statement of Lord *Langdale*, in *Perry* v. *Truefitt* (1), as quoted in the judgment of Vice-Chancellor *Wood* in *The Collins Company* v. *Cowen* (2), as it appears to me to concisely enunciate the principle applicable to the present case. It is this—"A man is not to sell his own goods under the pretence that they are the goods of another man; he cannot be permitted to practice such a deception, nor to use the means which contribute to that end." Now, that, I apprehend, is the true principle applicable to the present case. Then the question is this, has the Defendant used means to practice a deception? It is not denied that he has sold machines manufactured by himself as "*Singer*" machines; it is not denied that he has in his price lists described such machines as "*Singer*" machines; it is not denied that he has given directions to his salesmen and travellers to sell such machines as "*Singer*" machines. But after all the question is, has he when he has so sold such machines himself, or issued price lists or given directions to others to sell, guarded each and every of these acts from being of such a character as would deceive the public? Now, in the first place, it is beyond all question, and it is admitted, that the machines themselves do not carry upon them any representation that they are manufactured by the Plaintiff company; it is merely on the ground that they are called "*Singer*" machines that it is said there can be any inference that they are manufactured by the Plaintiff company. But this is not all. Upon all the Defendant's machines, and he says that no machines manufactured and sold by him have ever been issued without it, there is a label of considerable size, indicating that the machine is the manufacture not of the Plaintiffs but of the Defendant. Then, has he in the price lists in which he has described these machines as "*Singer*" machines described them in such a way as to deceive the public? In every advertisement I have seen it has been distinctly stated who is the manufacturer—there is not only the absence of any statement that the Plaintiffs are the manufacturers, but there is the distinct assertion that the manufacturer is the Defendant. One in particular, which has been alluded to, distinctly refers to the machines which "we" make, or which are made by *Newton Wilson & Co.* It seems to me

(1) 6 Peav. 66, 73. (2) 3 K. & J. 428.

C. A. 1876 — SINGER MANUFACTURING CO. v. WILSON. — Judgment, C. A. Baggallay, J.A.

impossible to say that, upon the face of any of the advertisements, or of any of the price lists, there is not a distinct intimation that the articles which the Defendant seeks to sell are made by himself. Then there comes the remaining suggestion that instructions were given to his salesmen and his travellers which would mislead purchasers. Several witnesses have been produced who have purchased machines manufactured by the Defendant at his shop in *London* or at his agency in *Dublin;* but after all, what does this evidence amount to? Two of these witnesses went to the Defendant's shop after replication had been filed in the suit, and their evidence is clearly inadmissible with reference to the case which is now before the Court. There is one case, however, which at first struck me as supporting to some extent the charge that the Defendant's servants had represented the machines sold at his shop as having been manufactured by the Plaintiffs; I asked whether there was any other evidence of a similar character, and I received a reply in the negative. But even in that case the witness said, "The young lady who sold me the machine remarked when I asked for a '*Singer*,' 'Oh yes, we make the "*Singer*."' " There was, therefore, a most clear and distinct statement made at the time by the shopwoman, that the machine she was selling was made by the person whose agent she was. And the evidence of that witness, when it is examined, so far from shewing a case of the kind suggested, clearly shews the contrary.

I am bound to say that I can see no real evidence of any persons having been misled in this manner. No doubt a number of witnesses have said, in very much the same terms, that when they order a "*Singer*" machine they mean a machine made by the *Singer Company* or their predecessors. But the length of time during which these witnesses say that they have been in the habit of using "*Singer*" machines shews that they must have been in the habit of getting their machines, previously to the time of the general trade in these articles, from the *Singer Company*, and, therefore, in all probability they associated the name in their own minds only with the machines made by that company. But how should that operate on the minds of other persons who buy a machine with a mark upon it, shewing that it is manufactured by

another firm, in consequence of having seen advertisements or price lists which distinctly state that the persons who issue the price lists or the advertisements are themselves the manufacturers of the machines which they sell? Upon the whole, I am of opinion that the Master of the Rolls arrived at an entirely right conclusion, and that this appeal must be dismissed.

C. A. 1876 SINGER MANUFACTURING CO. v. WILSON.

JAMES, L.J.:—

It will be dismissed with costs.

Solicitor for Plaintiffs: *J. N. Mason.*
Solicitors for Defendant: *Shaen, Roscoe, & Massey.*

DICKINSON *v.* DODDS.

C. A. 1876 V.-C. B. *Jan.* 25, 26. C. A. *March* 31; *April* 1.

[1874 D. 94.]

Vendor and Purchaser—Contract—Specific Performance—Offer to sell—Withdrawal before Acceptance—Sale to another Person—Notice.

An offer to sell property may be withdrawn before acceptance without any formal notice to the person to whom the offer is made. It is sufficient if that person has actual knowledge that the person who made the offer has done some act inconsistent with the continuance of the offer, such as selling the property to a third person.

Semble, that the sale of the property to a third person would of itself amount to a withdrawal of the offer, even although the person to whom the offer was first made had no knowledge of the sale.

Semble, that the acceptance of an offer to sell constitutes a contract for sale only as from the time of the acceptance. The contract does not relate back to the time when the offer was made.

The owner of property signed a document which purported to be an agreement to sell it at a price fixed. But a postscript was added, which he also signed—"This offer to be left over until Friday 9 A.M.":—

Held, that the document amounted only to an offer, which might be withdrawn at any time before acceptance, and that a sale to a third person which came to the knowledge of the person to whom the offer was made was an effectual withdrawal of the offer.

Decision of *Bacon*, V.C., reversed.

Statement.

ON Wednesday, the 10th of June, 1874, the Defendant *John Dodds* signed and delivered to the Plaintiff, *George Dickinson*, a memorandum, of which the material part was as follows:—

C. A. 1876 — DICKINSON v. DODDS. — Statement.

"I hereby agree to sell to Mr. *George Dickinson* the whole of the dwelling-houses, garden ground, stabling, and outbuildings thereto belonging, situate at *Croft*, belonging to me, for the sum of £800. As witness my hand this tenth day of June, 1874.

"£800. (Signed) *John Dodds.*"

"P.S.—This offer to be left over until Friday, 9 o'clock, A.M. *J. D.* (the twelfth), 12th June, 1874.

"(Signed) *J. Dodds.*"

The bill alleged that *Dodds* understood and intended that the Plaintiff should have until Friday 9 A.M. within which to determine whether he would or would not purchase, and that he should absolutely have until that time the refusal of the property at the price of £800, and that the Plaintiff in fact determined to accept the offer on the morning of Thursday, the 11th of June, but did not at once signify his acceptance to *Dodds*, believing that he had the power to accept it until 9 A.M. on the Friday.

In the afternoon of the Thursday the Plaintiff was informed by a Mr. *Berry* that *Dodds* had been offering or agreeing to sell the property to *Thomas Allan*, the other Defendant. Thereupon the Plaintiff, at about half-past seven in the evening, went to the house of Mrs. *Burgess*, the mother-in-law of *Dodds*, where he was then staying, and left with her a formal acceptance in writing of the offer to sell the property. According to the evidence of Mrs. *Burgess* this document never in fact reached *Dodds*, she having forgotten to give it to him.

On the following (Friday) morning, at about seven o'clock, *Berry*, who was acting as agent for *Dickinson*, found *Dodds* at the *Darlington* railway station, and handed to him a duplicate of the acceptance by *Dickinson*, and explained to *Dodds* its purport. He replied that it was too late, as he had sold the property. A few minutes later *Dickinson* himself found *Dodds* entering a railway carriage, and handed him another duplicate of the notice of acceptance, but *Dodds* declined to receive it, saying, "You are too late. I have sold the property."

It appeared that on the day before, Thursday, the 11th of June, *Dodds* had signed a formal contract for the sale of the property to the Defendant *Allan* for £800, and had received from him a deposit of £40.

C. A. 1876 DICKINSON v. DODDS.

The bill in this suit prayed that the Defendant *Dodds* might be decreed specifically to perform the contract of the 10th of June, 1874; that he might be restrained from conveying the property to *Allan;* that *Allan* might be restrained from taking any such conveyance; that, if any such conveyance had been or should be made, *Allan* might be declared a trustee of the property for, and might be directed to convey the property to, the Plaintiff; and for damages.

The cause came on for hearing before Vice-Chancellor *Bacon* on the 25th of January, 1876.

Argument.

Kay, Q.C., and *Caldecott,* for the Plaintiff:—

The memorandum of the 10th of June, 1874, being in writing, satisfies the *Statute of Frauds.* Though signed by the vendor only, it is effectual as an agreement to sell the property.

Supposing it to have been an offer only, an offer, if accepted before it is withdrawn, becomes, upon acceptance, a binding agreement. Even if signed by the person only who is sought to be charged, a proposal, if accepted by the other party, is within the statute: *Reuss* v. *Picksley* (1), following *Warner* v. *Willington* (2). In *Kennedy* v. *Lee* (3) Lord *Eldon* states the law to be, that if a person communicates his acceptance of an offer within a reasonable time after the offer being made, and if, within a reasonable time of the acceptance being communicated, no variation has been made by either party in the terms of the offer so made and accepted, the acceptance must be taken as simultaneous with the offer, and both together as constituting such an agreement as the Court will execute." So that, not only is a parol acceptance sufficient, but such an acceptance relates back to the date of the offer. This is further shewn by *Adams* v. *Lindsell* (4), where an offer of sale was made by letter to the Plaintiffs "on receiving their answer in course of post." The letter was misdirected, and did not reach the Plaintiffs until two days after it ought to have reached them. The Plaintiffs, immediately on receiving the letter, wrote an answer accepting; and it was held that they were entitled to the benefit of the contract.

(1) Law Rep. 1 Ex. 342.
(2) 3 Drew. 523.
(3) 3 Mer. 441, 454.
(4) 1 B. & A. 681.

C. A. 1876 — DICKINSON v. DODDS. — Argument.

The ruling in *Adams* v. *Lindsell* (1) was approved by the House of Lords in *Dunlop* v. *Higgins* (2), as appears from the judgment of Sir *G. Mellish*, L.J., in *Harris' Case* (3); and it is now settled that a contract which can be accepted by letter is complete when a letter containing such acceptance has been posted. The leaving by the Plaintiff of the notice at *Dodds'* residence was equivalent to the delivery of a letter by a postman.

That *Allan* is a necessary party appears from *Potter* v. *Sanders* (4); and if *Allan* has had a conveyance of the legal estate, the Court will decree specific performance against him.

Swanston, Q.C., and *Crossley*, for the Defendant *Dodds*:—

The bill puts the case no higher than that of an offer. Taking the memorandum of the 10th of June, 1874, as an offer only, it is well established that, until acceptance, either party may retract; *Cooke* v. *Oxley* (5); *Benjamin* on Sales (6).

After *Dodds* had retracted by selling to *Allan*, the offer was no longer open. Having an option to retract, he exercised that option: *Humphries* v. *Carvalho* (7); *Pollock* on Contracts (8); *Routledge* v. *Grant* (9).

In delivering judgment in *Martin* v. *Mitchell* (10), Sir *T. Plumer*, M.R., put the case of a contract signed by one party only. Being asked (11), "What mutuality is there, if the one is at liberty to renounce the contract, and the other not?" and in *Meynell* v. *Surtees* (12), the distinctions between an offer and an agreement in respect of binding land were pointed out: *Fry* on Specific Performance (13).

The postscript being merely voluntary, without consideration, is *nudum pactum;* and the memorandum may be read as if it contained no postscript.

Jackson, Q.C., and *Gazdar*, for the Defendant *Allan*:—

Allan is an unnecessary party. If *Dodds* has not made a valid

(1) 1 B. & A. 681.
(2) 1 H. L. C. 381.
(3) Law Rep. 7 Ch. 587, 595.
(4) 6 Hare, 1.
(5) 3 T. R. 653.
(6) 2nd Ed. p. 52.
(7) 16 East, 45.
(8) Page 8.
(9) 4 Bing. 653.
(10) 2 Jac. & W. 413.
(11) Page 428.
(12) 1 Jur. (N.S.) 737.
(13) Page 80.

contract with the Plaintiff, he is a trustee for *Allan*; if *Dodds* has made a binding contract, rights arise between *Allan* and *Dodds* which are not now in controversy.

We agree with the co-Defendant that, in order that the Plaintiff may have a *locus standi*, there must have been a contract. If the postscript is a modification of the offer, it is *nudum pactum*, and may be rejected.

It may be conceded that if there had been an acceptance, it would have related back in point of date to the offer. But there was no acceptance. Notice of acceptance served on Mrs. *Burgess* was not enough.

Even if it would have been otherwise sufficient, here it was too late. *Dodds* had no property left to contract for. The property had ceased to be his. He had retracted his offer; and the property had become vested in some one else: *Hebb's Case* (1).

The Plaintiff would not have delivered the notice if he had not heard of the negotiation between *Dodds* and *Allan*. What retractation could be more effectual than a sale of the property to some one else?

The Defendant *Allan* was a *bonâ fide* purchaser without notice.

Kay, in reply:—

The true meaning of the document was a sale. The expression is not "open," but "over." The only liberty to be allowed by that was a liberty for the Plaintiff to retract.

Considering it as an offer, the meaning was, that at any day or hour within the interval named, the Plaintiff had a right to intimate to the Defendant his acceptance, and from that moment the Defendant would have had no right of retractation. Then, what is a retractation before acceptance? To be a retractation, there must be a notification to the other party. A pure resolve within the recesses of the vendor's own mind is not sufficient. There was no communication to the Plaintiff. He accepted on two several occasions. There could have been no parting with the property without communication with him. He was told that the offer was to be left over.

The grounds of the decision in *Cooke* v. *Oxley* (2) have been

(1) Law Rep. 4 Eq. 9, 12. (2) 3 T. R. 653.

C. A. 1876

DICKINSON v. DODDS.

Judgment, V.-C. B.

abundantly explained by Mr. *Benjamin* in his work on Sales. It was decided simply on a point of pleading.

BACON, V.C., after remarking that the case involved no question of unfairness or inequality, and after stating the terms of the document of the 10th of June, 1874, and the statement of the Defendant's case as given in his answer, continued:—

I consider that to be one agreement, and I think the terms of the agreement put an end to any question of *nudum pactum*. I think the inducement for the Plaintiff to enter into the contract was the Defendant's compliance with the Plaintiff's request that there should be some time allowed to him to determine whether he would accept it or not. But whether the letter is read with or without the postscript, it is, in my judgment, as plain and clear a contract for sale as can be expressed in words, one of the terms of that contract being that the Plaintiff shall not be called upon to accept, or to testify his acceptance, until 9 o'clock on the morning of the 12th of June. I see, therefore, no reason why the Court should not enforce the specific performance of the contract, if it finds that all the conditions have been complied with.

Then what are the facts? It is clear that a plain, explicit acceptance of the contract was, on Thursday, the 11th of June, delivered by the Plaintiff at the place of abode of the Defendant, and ought to have come to his hands. Whether it came to his hands or not, the fact remains that, within the time limited, the Plaintiff did accept and testify his acceptance. From that moment the Plaintiff was bound, and the Defendant could at any time, notwithstanding *Allan*, have filed a bill against the Plaintiff for the specific performance of the contract which he had entered into, and which the Defendant had accepted.

I am at a loss to guess upon what ground it can be said that it is not a contract which the Court will enforce. It cannot be on the ground that the Defendant had entered into a contract with *Allan*, because, giving to the Defendant all the latitude which can be desired, admitting that he had the same time to change his mind as he, by the agreement, gave to the Plaintiff—the law, I take it, is clear on the authorities, that if a contract, unilateral in its

shape, is completed by the acceptance of the party on the other side, it becomes a perfectly valid and binding contract. It may be withdrawn from by one of the parties in the meantime, but, in order to be withdrawn from, information of that fact must be conveyed to the mind of the person who is to be affected by it. It will not do for the Defendant to say, "I made up my mind that I would withdraw, but I did not tell the Plaintiff; I did not say anything to the Plaintiff until after he had told me by a written notice and with a loud voice that he accepted the option which had been left to him by the agreement." In my opinion, after that hour on Friday, earlier than nine o'clock, when the Plaintiff and Defendant met, if not before, the contract was completed, and neither party could retire from it.

It is said that the authorities justify the Defendant's contention that he is not bound to perform this agreement, and the case of *Cooke* v. *Oxley* (1) was referred to. But I find that the judgment in *Cooke* v. *Oxley* went solely upon the pleadings. It was a rule to shew cause why judgment should not be arrested, therefore it must have been upon the pleadings. Now, the pleadings were that the vendor in that case proposed to sell to the Defendant. There was no suggestion of any agreement which could be enforced. The Defendant proposed to the Plaintiff to sell and deliver, if the Plaintiff would agree to purchase upon the terms offered, and give notice at an earlier hour than four of the afternoon of that day; and the Plaintiff says he agreed to purchase, but does not say the Defendant agreed to sell. He agreed to purchase, and gave notice before four o'clock in the afternoon. Although the case is not so clearly and satisfactorily reported as might be desired, it is only necessary to read the judgment to see that it proceeds solely upon this allegation in the pleadings. Mr. Justice *Buller* says, "As to the subsequent time, the promise can only be supported upon the ground of a new contract made at four o'clock; but there was no pretence for that." Nor was there the slightest allegation in the pleadings for that; and judgment was given against the Plaintiff.

Routledge v. *Grant* (2) is plainly distinguishable from this case upon the grounds which have been mentioned. There the contract

(1) 3 T. R. 653.

(2) 4 Bing. 653.

DICKINSON v. DODDS.

Judgment, V.-C. B.

was to sell on certain terms; possession to be given upon a particular day. Those terms were varied, and therefore no agreement was come to; and when the intended purchaser was willing to relinquish the condition which he imposed, the other said, "No, I withdraw; I have made up my mind not to sell to you;" and the judgment of the Court was that he was perfectly right.

Then *Warner* v. *Willington* (1) seems to point out the law in the clearest and most distinct manner possible. An offer was made—call it an agreement or offer, it is quite indifferent. It was so far an offer, that it was not to be binding unless there was an acceptance, and before acceptance was made, the offer was retracted, the agreement was rescinded, and the person who had then the character of vendor declined to go further with the arrangement, which had been begun by what had passed between them. In the present case I read the agreement as a positive engagement on the part of the Defendant *Dodds* that he will sell for £800, and, not a promise, but, an agreement, part of the same instrument, that the Plaintiff shall not be called upon to express his acquiescence in that agreement until Friday at nine o'clock. Before Friday at nine o'clock the Defendant receives notice of acceptance. Upon what ground can the Defendant now be let off his contract? It is said that *Allan* can sustain his agreement with the Defendant, because at the time when they entered into the contract the Defendant was possessed of the property, and the Plaintiff had nothing to do with it. But it would be opening the door to fraud of the most flagrant description if it was permitted to a Defendant, the owner of property, to enter into a binding contract to sell, and then sell it to somebody else and say that by the fact of such second sale he has deprived himself of the property which he has agreed to sell by the first contract. That is what *Allan* says in substance, for he says that the sale to him was a retractation which deprived *Dodds* of the equitable interest he had in the property, although the legal estate remained in him. But by the fact of the agreement, and by the relation back of the acceptance (for such I must hold to be the law) to the date of the agreement, the property in equity was the property of the Plaintiff, and *Dodds* had nothing to sell to *Allan*. The property

(1) 3 Drew. 523. 2 Jur NS 433

C. A. 1876 DICKINSON v. DODDS.

remained intact, unaffected by any contract with *Allan*, and there is no ground, in my opinion, for the contention that the contract with *Allan* can be supported. It would be doing violence to principles perfectly well known and often acted upon in this Court. I think the Plaintiff has made out very satisfactorily his title to a decree for specific performance, both as having the equitable interest, which he asserts is vested in him, and as being a purchaser of the property for valuable consideration without notice against both *Dodds*, the vendor, and *Allan*, who has entered into the contract with him.

Judgment, V.-C. B.

There will be a decree for specific performance, with a declaration that *Allan* has no interest in the property; and the Plaintiff will be at liberty to deduct his costs of the suit out of his purchase-money.

C. A.

From this decision both the Defendants appealed, and the appeals were heard on the 31st of March and the 1st of April, 1876.

Argument.

Swanston, Q.C. (*Crossley* with him) for the Defendant *Dodds*.

Sir *H. Jackson*, Q.C. (*Gazdar* with him), for the Defendant *Allan*.

Kay, Q.C., and *Caldecott*, for the Plaintiff.

The arguments amounted to a repetition of those before the Vice-Chancellor. In addition to the authorities then cited the following cases were referred to: *Thornbury* v. *Bevill* (1); *Taylor* v. *Wakefield* (2); *Head* v. *Diggon* (3); *Palmer* v. *Scott* (4).

Judgment, C. A James, L.J.

JAMES, L.J., after referring to the document of the 10th of June, 1874, continued:—

The document, though beginning "I hereby agree to sell," was nothing but an offer, and was only intended to be an offer, for the Plaintiff himself tells us that he required time to consider whether he would enter into an agreement or not. Unless both parties had then agreed there was no concluded agreement then made; it was

(1) 1 Y. & C. Ch. 554.
(2) 6 E. & B. 765.
(3) 3 Man. & Ry. 97.
(4) 1 Russ. & My. 391.

C. A. 1876
DICKINSON v. DODDS.
Judgment, C. A. James, L.J.

in effect and substance only an offer to sell. The Plaintiff, being minded not to complete the bargain at that time, added this memorandum—"This offer to be left over until Friday, 9 o'clock A.M., 12th June, 1874." That shews it was only an offer. There was no consideration given for the undertaking or promise, to whatever extent it may be considered binding, to keep the property unsold until 9 o'clock on Friday morning; but apparently *Dickinson* was of opinion, and probably *Dodds* was of the same opinion, that he (*Dodds*) was bound by that promise, and could not in any way withdraw from it, or retract it, until 9 o'clock on Friday morning, and this probably explains a good deal of what afterwards took place. But it is clear settled law, on one of the clearest principles of law, that this promise, being a mere *nudum pactum*, was not binding, and that at any moment before a complete acceptance by *Dickinson* of the offer, *Dodds* was as free as *Dickinson* himself. Well, that being the state of things, it is said that the only mode in which *Dodds* could assert that freedom was by actually and distinctly saying to *Dickinson*, "Now I withdraw my offer." It appears to me that there is neither principle nor authority for the proposition that there must be an express and actual withdrawal of the offer, or what is called a retractation. It must, to constitute a contract, appear that the two minds were at one, at the same moment of time, that is, that there was an offer continuing up to the time of the acceptance. If there was not such a continuing offer, then the acceptance comes to nothing. Of course it may well be that the one man is bound in some way or other to let the other man know that his mind with regard to the offer has been changed; but in this case, beyond all question, the Plaintiff knew that *Dodds* was no longer minded to sell the property to him as plainly and clearly as if *Dodds* had told him in so many words, "I withdraw the offer." This is evident from the Plaintiff's own statements in the bill.

The Plaintiff says in effect that, having heard and knowing that *Dodds* was no longer minded to sell to him, and that he was selling or had sold to some one else, thinking that he could not in point of law withdraw his offer, meaning to fix him to it, and endeavouring to bind him, "I went to the house where he was lodging, and saw his mother-in-law, and left with her an acceptance of the

offer, knowing all the while that he had entirely changed his mind. I got an agent to watch for him at 7 o'clock the next morning, and I went to the train just before 9 o'clock, in order that I might catch him and give him my notice of acceptance just before 9 o'clock, and when that occurred he told my agent, and he told me, you are too late, and he then threw back the paper." It is to my mind quite clear that before there was any attempt at acceptance by the Plaintiff, he was perfectly well aware that *Dodds* had changed his mind, and that he had in fact agreed to sell the property to *Allan*. It is impossible, therefore, to say there was ever that existence of the same mind between the two parties which is essential in point of law to the making of an agreement. I am of opinion, therefore, that the Plaintiff has failed to prove that there was any binding contract between *Dodds* and himself.

MELLISH, L.J. :—

I am of the same opinion. The first question is, whether this document of the 10th of June, 1874, which was signed by *Dodds*, was an agreement to sell, or only an offer to sell, the property therein mentioned to *Dickinson;* and I am clearly of opinion that it was only an offer, although it is in the first part of it, independently of the postscript, worded as an agreement. I apprehend that, until acceptance, so that both parties are bound, even though an instrument is so worded as to express that both parties agree, it is in point of law only an offer, and, until both parties are bound, neither party is bound. It is not necessary that both parties should be bound within the *Statute of Frauds*, for, if one party makes an offer in writing, and the other accepts it verbally, that will be sufficient to bind the person who has signed the written document. But, if there be no agreement, either verbally or in writing, then, until acceptance, it is in point of law an offer only, although worded as if it were an agreement. But it is hardly necessary to resort to that doctrine in the present case, because the postscript calls it an offer, and says, "This offer to be left over until Friday, 9 o'clock A.M." Well, then, this being only an offer, the law says—and it is a perfectly clear rule of law—that, although it is said that the offer is to be left open until Friday morning at

C. A. 1876
DICKINSON v. DODDS.
Judgment, C. A. Mellish, L.J.

9 o'clock, that did not bind *Dodds*. He was not in point of law bound to hold the offer over until 9 o'clock on Friday morning. He was not so bound either in law or in equity. Well, that being so, when on the next day he made an agreement with *Allan* to sell the property to him, I am not aware of any ground on which it can be said that that contract with *Allan* was not as good and binding a contract as ever was made. Assuming *Allan* to have known (there is some dispute about it, and *Allan* does not admit that he knew of it, but I will assume that he did) that *Dodds* had made the offer to *Dickinson*, and had given him till Friday morning at 9 o'clock to accept it, still in point of law that could not prevent *Allan* from making a more favourable offer than *Dickinson*, and entering at once into a binding agreement with *Dodds*.

Then *Dickinson* is informed by *Berry* that the property has been sold by *Dodds* to *Allan*. *Berry* does not tell us from whom he heard it, but he says that he did hear it, that he knew it, and that he informed *Dickinson* of it. Now, stopping there, the question which arises is this—If an offer has been made for the sale of property, and before that offer is accepted, the person who has made the offer enters into a binding agreement to sell the property to somebody else, and the person to whom the offer was first made receives notice in some way that the property has been sold to another person, can he after that make a binding contract by the acceptance of the offer? I am of opinion that he cannot. The law may be right or wrong in saying that a person who has given to another a certain time within which to accept an offer is not bound by his promise to give that time; but, if he is not bound by that promise, and may still sell the property to some one else, and if it be the law that, in order to make a contract, the two minds must be in agreement at some one time, that is, at the time of the acceptance, how is it possible that when the person to whom the offer has been made knows that the person who has made the offer has sold the property to someone else, and that, in fact, he has not remained in the same mind to sell it to him, he can be at liberty to accept the offer and thereby make a binding contract? It seems to me that would be simply absurd. If a man makes an offer to sell a particular horse in his stable, and says, "I will give you until the day after to-morrow to

accept the offer," and the next day goes and sells the horse to somebody else, and receives the purchase-money from him, can the person to whom the offer was originally made then come and say, "I accept," so as to make a binding contract, and so as to be entitled to recover damages for the non-delivery of the horse? If the rule of law is that a mere offer to sell property, which can be withdrawn at any time, and which is made dependent on the acceptance of the person to whom it is made, is a mere *nudum pactum*, how is it possible that the person to whom the offer has been made can by acceptance make a binding contract after he knows that the person who has made the offer has sold the property to some one else? It is admitted law that, if a man who makes an offer dies, the offer cannot be accepted after he is dead, and parting with the property has very much the same effect as the death of the owner, for it makes the performance of the offer impossible. I am clearly of opinion that, just as when a man who has made an offer dies before it is accepted it is impossible that it can then be accepted, so when once the person to whom the offer was made knows that the property has been sold to some one else, it is too late for him to accept the offer, and on that ground I am clearly of opinion that there was no binding contract for the sale of this property by *Dodds* to *Dickinson*, and even if there had been, it seems to me that the sale of the property to *Allan* was first in point of time. However, it is not necessary to consider, if there had been two binding contracts, which of them would be entitled to priority in equity, because there is no binding contract between *Dodds* and *Dickinson*.

BAGGALLAY, J.A.:—

I entirely concur in the judgments which have been pronounced.

JAMES, L.J.:—The bill will be dismissed with costs.

Swanston, Q.C.:—We shall have the costs of the appeal.

Kay, Q.C.:—There should only be the costs of one appeal.

Sir *H. Jackson*, Q.C.:—The Defendant *Allan* was obliged to protect himself.

C. A. 1876 DICKINSON v. DODDS.

MELLISH, L.J.:—He had a separate case. There might, if two contracts had been proved, have been a question of priority.

JAMES, L.J.:—I think the Plaintiff must pay the costs of both appeals.

Solicitor for Appellants: *O. B. Wooler.*

Solicitor for Plaintiff: *R. T. Jarvis,* agent for *Hutchinson & Lucas, Darlington.*

C. A. 1876 V.-C. M. *Jan.* 29. C. A. *April* 1.

In re INTERNATIONAL LIFE ASSURANCE SOCIETY.

Winding-up—Unlimited Insurance Company—Limitation of Liability on Policies—Mortgage of Limited Assets—Marshalling.

The directors of an insurance company, the liability of whose members was unlimited except as to the claims of policy-holders, borrowed money for the purposes of the company's business from the company's bankers, and gave the bankers as security a charge upon some calls which had been made upon the members. Before the calls had been paid the company was ordered to be wound up. In the winding-up the debt to the bankers was paid off out of the limited assets:—

Held (reversing a decision of *Malins,* V.C.), that the policy-holders had no equity to have the assets marshalled, so as to throw any part of the bankers' debt upon the unlimited assets.

Statement.

THE *International Life Assurance Society* was a life assurance company, the liability of the shareholders being unlimited as regarded the general creditors, but limited, as regarded the policy-holders, by a clause in each policy which provided that "the funds and property of the society, according to the deed or deeds of settlement thereof, after satisfying all assurances granted by the society previously payable, and all other prior charges on such funds and property," should be subject and liable to pay the sum assured on the death of the life assured.

The bankers of the society were Messrs. *Glyn & Co.* In August, 1868, the society were in need of money for the purposes of their business. There then remained uncalled on the shares, according to the provisions of the deed of settlement, the sum of £11 per share. On the 13th of August, 1868, the directors made a call of £2 per share, payable in two equal instalments, on the

30th of September and the 30th of October, 1868. On the 14th of August the directors obtained for the society an advance of £5000 from *Glyn & Co.* This loan was made upon the security of a resolution of the directors, charging the proceeds of the call in favour of *Glyn & Co.* with the repayment of the £5000 and interest, and of a joint and several promissory note for £5051 7*s.* 4*d.*, in favour of *Glyn & Co.*, dated the 17th of August, and payable on the 1st of November, 1868, and signed by four of the directors, Messrs. *Symes*, *Richardson*, *West*, and *Gibbs*. On the 14th of November, 1868, a petition for the winding-up of the society was presented by a shareholder. It came on to be heard in December, and was then ordered to stand over. On the 14th of January, 1869, there remained due to *Glyn & Co.* a balance of £1434 10*s.* in respect of the loan of £5000, and there was due to them a further sum of £2077 3*s.* 10*d.* in respect of the banking account of the society, which was overdrawn. *Glyn & Co.* called on the directors to give them a new promissory note for £3511 13*s.* 10*d.*, the aggregate of these two sums, and a further charge on unpaid calls on the shares. On the 27th of January, 1869, the directors passed a resolution charging the two sums of £1434 10*s.* and £2077 3*s.* 10*d.* upon the call made on the 13th of August, 1868, and on a previous call of £2 per share, which had been made on the 9th of April, 1868. A joint and several promissory note for the same sums was also given to *Glyn & Co.*, signed by the same four directors. On the 19th of February, 1869, an order to wind up the society was made by Vice-Chancellor *Malins* on the petition. On the 9th of June, 1869, *Gibbs*, one of the four directors, under a threat of legal proceedings, paid *Glyn & Co.* the sum of £2680 10*s.*, the balance then remaining due to them on the promissory notes, and £10 10*s.* for their costs, making a total of £2691. *West*, another of the four directors, afterwards repaid *Gibbs* £897, a part of the £2691.

On the 22nd of January, 1870, an order was made by the Vice-Chancellor that *West* should be admitted a creditor of the society for £300 (which he had paid for the society in February, 1869), and for £897 (part of the £2691), and that the amount due from him on a then existing call of £5 per share should be set off *pro tanto* against the sums of £300 and £897; and that *Gibbs* should be admitted a creditor for £1100 (which he had advanced to the

C. A. 1876 *In re* INTERNATIONAL LIFE ASSURANCE SOCIETY. Statement.

society in April, 1868), and for £1794, the balance of the £2691. The amount due from *Gibbs* on the call of £5 was to be set off *pro tanto* against the £1100, and the question was reserved whether *West* and *Gibbs* were or were not entitled to a lien on the calls of April and August, 1868. The order was expressed to be made without prejudice to any claim which might be brought forward within six weeks by the liquidator or any other person interested in the winding-up against *Gibbs* and *West*, in respect of the business of the society having been, as alleged, carried on in violation of the 46th clause of the deed of settlement, and without prejudice to any question whether *Gibbs* and *West* were entitled to rank in competition with other creditors, and to the right to set off the above-mentioned sums against the call, but in the mean time the call of £5 was not to be enforced against *Gibbs* and *West*. And, until the question of lien was decided, the liquidator was ordered to retain in hand, out of the moneys received or to be received by him in respect of the calls of April and August, 1868, a sufficient amount to meet the sums of £897, £1100, and £1794, and interest thereon.

On the 6th of July, 1870, another order was made by the Vice-Chancellor, by which it was declared that *Glyn & Co.* had, by virtue of the resolutions of the 14th of August, 1868, and the 27th of January, 1869, a valid charge on the calls of April and August, 1868, for the amounts secured by those resolutions respectively (the Court being of opinion that the charge which the resolutions of the 27th of January, 1869, purported to create ought, under the circumstances, to be treated as valid); and it was declared that *West* and *Gibbs* were entitled to stand in the place of *Glyn & Co.* for the £2680 10*s.*, with interest thereon, till they should be paid, *West* and *Gibbs* being respectively entitled to the benefit of the charge in the proportion of £893 and £1787; and it was declared that the sums due from *West* on any call made or to be made ought to be set off *pro tanto* against the £300 due to him, and then against so much of the £897 and interest as might not be paid out of the moneys subject to his charge; and a similar declaration was made as to the sums of £1100 and £1794, and interest, due to *Gibbs*.

The judgment of the Vice-Chancellor on the making of this

order is reported (1). Neither this order nor that of the 22nd of January, 1870, was appealed from.

On the 9th of August, 1870, an order was made that the liquidator should, out of moneys in his hands which had arisen from the calls of April and August, 1868, pay £1083 10*s.*, part of the £1787, to *Gibbs*, and this sum was paid to him accordingly.

The other amounts due to *Gibbs* and *West* respectively were afterwards paid or allowed to them by the liquidator out of the proceeds of the calls of April and August, 1868.

On the 4th of June, 1869, an agreement was entered into between the liquidator of the society and the *Prudential Assurance Company*, by which, in consideration of certain payments to be made by the liquidator, the company undertook to discharge all the liabilities of the society upon policies. This agreement was afterwards approved by the Court. On the 1st of February, 1875, an order was made by the Lords Justices (in substitution for a previous order of the Vice-Chancellor) that the sum of £17,391 17*s.* 11*d.* should be paid by the liquidator to the *Prudential Company* out of the limited assets of the society (*i.e.*, the property and effects and unpaid capital of the society, without having recourse to calls on the contributories beyond the amount prescribed by the deed of settlement).

By a certificate of the Chief Clerk dated the 5th of August, 1875, it was found that there was in the hands of the liquidator in respect of the limited assets of the society a balance of only £4005 16*s.* 7*d.*

In the account of the receipts and payments of the liquidator in respect of the limited assets upon which this certificate was founded it appeared that £2883 10*s.* had been paid to *Gibbs*, or allowed to him by way of set-off on account of the above-mentioned debts of £1100 and £1787. The *Prudential Company* moved to vary the certificate, on the ground that *Gibbs* was a general creditor in respect of those sums, and was entitled to resort to the unlimited as well as the limited assets, and that, therefore, those sums ought to be charged against the limited assets to the extent of only 5*s.* 6*d.* in the pound, that being the amount of the dividend which those assets had paid to the other creditors.

(1) Law Rep. 10 Eq. 312.

C. A. 1876

In re INTERNATIONAL LIFE ASSURANCE SOCIETY.

The case came on for argument before Vice-Chancellor *Malins* on the 29th of January, 1876.

Higgins, Q.C., and *Phear*, for the *Prudential Company*.

J. Pearson, Q.C., and *A. T. Watson*, for the representatives of the contributories.

Glasse, Q.C., and *Grosvenor Woods*, for the liquidator.

Judgment, V.-C. M.

MALINS, V.C., after stating the facts, continued:—

It is contended that this question is already decided. If so, I shall not reopen it. But what did I decide? I did nothing more than say that these directors were entitled to set off a debt owing to them against calls made upon them. It is very true I did decide that they were entitled to set it off against the limited assets; but why? Because at that time nothing but limited assets existed, nor did any one contemplate that anything but limited assets would ever exist. The assets were limited up to £20 a share, but beyond that £20 they were unlimited. That is what I decided in 1870. The liquidator has told me this morning that the call beyond the £20 was not made until 1874—that is, four years after my decision, when I had nothing in my mind but limited assets. That was the element of my decision, because nothing else existed then, and I had no reason to suppose there would ever be anything else. Therefore I decided that there was a set-off as against the limited assets, but I did not decide, nor could I then, that there was no claim except as against the limited assets. But, considering that the £1100 was advanced for the general purposes of the company, that the money borrowed of *Glyn & Co.* was also advanced for the general purposes of the company, I can draw no distinction. It appears to me perfectly clear that there is a right of set-off in respect of these debts against the general assets of the company, and inasmuch as there are two classes of assets, one of which, and one only, is applicable to the policy-holders, because they have contracted for a limited liability, both being applicable to the general creditors, *Gibbs* and *West* are entitled to resort to the general assets. The consequence is, that, inasmuch as it appears by the accounts that their debts

have been paid out of the limited assets, the sums paid to them must now be apportioned between the limited and the unlimited assets. C. A. 1876 *In re* INTERNATIONAL LIFE ASSURANCE SOCIETY.

The order, which was drawn up in pursuance of this judgment, directed that the certificate should be varied by reducing the sum of £2883 10*s.* charged against the limited assets to £792 19*s.* 3*d.*, being a dividend at the rate of 5*s.* 6*d.* in the pound.

From this order *Gibbs* and a Mr. *Cameron*, as representing the contributories, appealed. The notice of appeal asked that instead of £792 19*s.* 3*d.* the sum of £2086 might be allowed as against the limited assets, viz., £1783 10*s.*, part of the amount originally secured by the mortgage of the calls, and £302 10*s.*, being 5*s.* 6*d.* in the pound upon the £1100 advanced by *Gibbs* to the society. The appeal came on to be heard on the 1st of April, 1876. C. A.

J. Pearson, Q.C., and *A. T. Watson*, for the Appellants:— Argument.

Gibbs and *West* were sureties for the society, and when they paid off the debt due to *Glyn & Co.* they became entitled to the benefit of their charge on the calls. The Vice-Chancellor held, that, being also general creditors, they must go rateably against the unlimited assets. That would be in effect to deprive them of their security, and it would also be marshalling the limited and unlimited assets in favour of the policy-holders. This, it has been held in previous cases, cannot be done. If the limited assets had been applied in the discharge of current liabilities of whatever kind, the policy-holders would have had no right to be recouped out of the unlimited assets. The sureties were, in fact, paid before any calls were made beyond the amount of the shares. The effect of the Vice-Chancellor's order will be, that *Gibbs*, who was a large shareholder, will be now called on to pay a large sum to satisfy the debt due to himself.

Phear (*Higgins*, Q.C., with him), for the *Prudential Company*:—

It is not proposed to make any new call; the sureties have been paid, and the only question is out of which fund they are to be considered as having been paid. We are entitled to receive a

C. A. 1876 *In re* INTERNATIONAL LIFE ASSURANCE SOCIETY.

large sum out of the limited assets, more, indeed, than the total amount of them. *Gibbs* was admitted first of all as a general creditor.

Glasse, Q.C., and *Grosvenor Woods*, for the liquidator.

Judgment, C. A. James, L.J.

JAMES, L.J.:—

We are bound by the orders of January and July, 1870, which have not been appealed from; we cannot go behind them. Those orders declared that *Glyn & Co.* had a valid charge on the particular calls mortgaged to them, and that the sureties, having paid off *Glyn & Co.*, were entitled to the benefit of their charge. The produce of the two calls that had been made at the time the charge was given was apparently enough to pay it off. That being so, the mortgagees would have had a right to say, We are not bound to wait until you see what there is to pay the general creditors; we have a right to be paid at once out of the property which was charged to us. They have, in fact, been paid in that way, and it seems to me that there is no equity on the part of the other creditors to have the assets marshalled in their favour. The thing must be taken as it stands. The mortgagees having been paid off out of the limited assets, the *Prudential Company* have no equity to alter what has been done, or to say that the payment is now to be treated as having been made out of a fund out of which it has not in fact been made.

Mellish, L.J.

MELLISH, L.J.:—

I am of the same opinion. The difficulty arises out of the very peculiar right which policy-holders have against the assets of a company of this kind. In an ordinary case of bankruptcy, where there is a charge in favour of one creditor on a particular asset of the bankrupt, it is wholly immaterial to the other creditors out of what fund the charge is paid off. But here the policy-holders are only entitled to be paid out of a particular part of the assets, though they have no charge upon that part any more than the other creditors have. The only doubt I felt was by reason of the general rule that, after a bankruptcy or a winding-up, the rights

of the creditors are not to be affected by anything which the Court does. But, it having been held that these directors had a valid charge on these calls, it followed that they were entitled to be paid out of them, and they were *de facto* paid out of them, and I think there is no equity now to alter what has been done.

C. A. 1876 *In re* INTERNATIONAL LIFE ASSURANCE SOCIETY.

Judgment, C.A. Baggallay, J.A.

BAGGALLAY, J.A.:—

I am of the same opinion. I think that the alteration we are now asked to make in the Vice-Chancellor's order is a necessary consequence of his order of July, 1870.

Solicitor for Appellants: *P. Roberts.*
Solicitors for *Prudential Company: Barnard & Co.*
Solicitor for Liquidator: *John Tucker.*

In re RATHBONE.

C. A. 1876 *April* 5.

New Trustee—Vesting Order—Leaseholds—No Personal Representative— 13 & 14 *Vict. c.* 60, *ss.* 32, 34.

Where the proving executors of the last surviving trustee and executor of a will were dead, the Court, having appointed new trustees of the will, made an order vesting in the new trustees the leaseholds of the original testator for all the estate therein of the last surviving trustee and executor.

In re Dalgleish's Settlement (1) overruled.

Statement.

JAMES RATHBONE, who died in 1836, by his will devised and bequeathed the residue of his estate to *Noah Rathbone* and *William Worthington,* upon certain trusts for tenants for life and for remaindermen, and appointed *Noah Rathbone* and *William Worthington* executors of his will. *Noah Rathbone* and *William Worthington* both proved the will. *Noah Rathbone* died in 1839, and *William Worthington* died in 1842, having by his will appointed *Richard Edwards, Louisa Worthington,* and *Eleanor Worthington,* executors thereof. *Richard Edwards* and *Eleanor Worthington* proved the will of *William Worthington,* but never acted in the trusts of the will of *James Rathbone,* and were both dead. *Louisa*

(1) 1 Ch. D. 46, Rev'd on appl 4 Ch D. 143

C. A. 1876

In re RATHBONE.

Worthington, as was stated at the Bar, refused to act in any manner.

Statement.

Some of the persons interested in the estate of *James Rathbone* presented a petition for the appointment of new trustees of the will of *James Rathbone*, in substitution for *Noah Rathbone* and *W. Worthington*.

The Vice-Chancellor *Hall* appointed new trustees and made a vesting order as to the *choses in action* forming part of the estate of *James Rathbone*, but declined to make any vesting order as to the leaseholds, following the decision in *In re Dalgleish's Settlement* (1), suggesting, however, that the petition should be brought before the Court of Appeal.

Argument.

Whitaker, in support of the petition, referred to *In re Driver's Settlement* (2), *In re Robinson's Will* (3), and to sects. 32 and 34 of the *Trustee Act*, 1850, and sect. 9 of the *Trustee Extension Act*, 1852. As the same persons were both trustees and executors, it was impossible to say that the legal estate had vested in them by the assent of the executors.

Judgment.

THE COURT (*James*, L.J., *Mellish*, L.J., and *Baggallay*, J.A.) made an order varying the order of the Vice-Chancellor *Hall*, and ordering that the leaseholds should vest in the new trustees for all the estate therein of *William Worthington* at the time of his death.

Solicitors: *Stephens & Stephens; J. W. Hickin.*

(1) 1 Ch. D. 46. (2) Law Rep. 19 Eq. 352.
(3) 9 Jur. (N.S.) 885.

(a) Subject on appl. Ch. of appl. may by has applied under the powers & made a vesting order see S.C. 4 Ch D. 143. C.A.

In re BESTWICK. *Ex parte* BESTWICK.

C. A. 1876 April 6.

Composition—Secured Creditor—Effect of Debtor's Valuation of Security—Right to receive Composition on Balance due after Realization of Security—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 126—*Bankruptcy Rules*, 1870, *r.* 272.

A secured creditor is in no way bound by a compounding debtor's estimate of the value of his security.

He is entitled to abstain from proving his debt or taking any part in the composition proceedings, and, when he has realized his security, he may claim from the debtor payment of the composition upon the balance which may then remain unsatisfied of the debt.

Decision of *Bacon*, C.J., affirmed.

Statement.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy (1).

The following short summary of the case will be sufficient for the purpose of this report:—

Thomas and *William Bestwick* filed a liquidation petition on the 29th of November, 1870. At the first meeting of the creditors on the 23rd of December, 1870, the debtors produced a statement of their affairs, which shewed (*inter alia*) that *G. E. Hodgkinson* and *H. Whitten* were creditors for £3300, as security for which they held a mortgage upon a mill and machinery belonging to the debtors, the value of which the debtors estimated at £3300. The creditors at the meeting resolved that a composition of 10*s.* in the pound should be accepted in satisfaction of the debts due to the creditors, and this resolution was confirmed at the second meeting on the 5th of January, 1871. The resolution was afterwards registered. *Hodgkinson* and *Whitten*, who had due notice of the meetings, took no part in the proceedings; they did not attempt to prove their debt, and the composition was not paid or tendered to them. On the 1st of June, 1873, the composition having been then duly paid to the other creditors, *Hodgkinson* and *Whitten* sold the mortgaged property under a power of sale contained in the mortgage deed. The amount realized by the sale was not sufficient to pay the debt in full. The mortgagees claimed payment from

(1) 1 Ch. D. 702, where the facts are fully stated.

C. A. 1876

In re BESTWICK.

Ex parte BESTWICK.

Argument.

the debtors of the composition upon the balance of the £3300 which remained unsatisfied. The Chief Judge held that they were entitled to this. The debtors appealed.

Little, Q.C., and *S. Taylor*, for the Appellants:—

The mortgagees retained their security, but they lost their right of action for their debt, unless indeed the debtors should have made default in payment of the composition, in which case the right of action would have revived. The creditors resolved that 10*s.* in the pound should be accepted in satisfaction of the debts. That resolution was come to on the basis of the debtors' statement of affairs, which shewed that the security held by the mortgagees would pay their debt in full. The mortgagees might have intervened, and insisted on having their security valued, but as they did not, they must be taken to have assented to the debtors' valuation. They have lost their right of action for their debt.

[MELLISH, L.J., referred to *Edwards* v. *Hancher* (1), in which it was held that the acceptance of a composition does not discharge the debts until payment is made.]

Section 126 of the *Bankruptcy Act*, 1869, provides that in a composition the value of the debts of secured creditors is to be estimated in the same way as in bankruptcy.

[JAMES, L.J.:—That is only for the purpose of calculating the majority of votes at the meeting.]

Rule 272 of the Bankruptcy Rules, 1870, shews that a secured creditor cannot prove without first assessing the value of his security, and that he is bound by that assessment. By composition resolutions the debtor is discharged: *Edwards* v. *Coombe* (2); *Slater* v. *Jones* (3). The agreement between the debtor and the creditors is that the composition shall be paid on the amount of debts shewn in the debtor's statement.

[JAMES, L.J.:—The majority cannot fix the amount of the debts due to the minority; the Act contains no provision so wicked as that.]

(1) 1 C. P. D. 111. (2) Law Rep. 7 C. P. 519.
(3) Law Rep. 8 Ex. 186.

Argument.

Section 126 says that the provisions of the composition are to be binding on all the creditors whose names and addresses, and the amount of the debts due to whom, are shewn in the debtor's statement.

[MELLISH, L.J.:—That means if the debts are correctly stated.]

The Act and the Rules give ample opportunity to the creditor to dispute the debtor's valuation of the security. He can intervene at any time before the close of the composition proceedings. Form 39 in the schedule to the Bankruptcy Rules, 1870, shews how the debtor's statement is to be made, and it is obvious that the valuation of the securities of the secured creditors is an essential part of the proceedings. A secured creditor is bound to intervene if he wishes to dispute the debtor's valuation of his security.

De Gex, Q.C., and *Bagley*, for the mortgagees, were not called on.

Judgment, James, L.J.

JAMES, L.J.:—

The case seems to me a very plain one, though the argument has occupied a long time. The Act says that the prescribed majority of the creditors shall have power to bind the absent or dissentient minority to accept a composition in satisfaction of their debts; it nowhere says that the majority can bind the minority with regard to the amount of their debts, or that they can bind a secured creditor with regard to the value of his security. Section 126 indeed says that the composition is to be accepted in satisfaction of the debts: it says nothing about the debts of those creditors who may hold security, and the words, if taken literally, would compel a secured creditor to accept the composition in satisfaction of the whole amount of his debt, but they have been always construed as meaning that he is to take the composition only on the ultimate balance of his debt which may remain due after realizing his security. When he has realized his security he has a right to say to the debtor, So much remains due to me, pay me the composition upon that. That is the whole of this case, and I am of opinion that the decision of the Chief Judge was quite right.

C. A. 1876

In re BESTWICK. *Ex parte* BESTWICK.

Judgment, Mellish, L.J.

14 CD 92

MELLISH, L.J.:—

I am of the same opinion. In a bankruptcy or a liquidation by arrangement a secured creditor is not entitled to receive any dividend until he has come in and proved his debt, and if he does this before realizing his security he must put a value on it. The question is whether in a composition a secured creditor is bound by the value which the debtor sets upon the security. There is not a word in the Act to say that he is. Why should he not be entitled to do that which he would have a right to do in a bankruptcy or a liquidation, that is to say, wait until he has realized his security, and then come in and prove the debt then due to him, and receive dividends on it, though of course he could not disturb any dividends already paid? But he would be entitled to share with the other creditors in the assets which might then remain for distribution. I can see no reason why he should not do the same thing in a composition; though there is this difference, that in the case of a bankruptcy or a liquidation, if he waited too long he might get no dividend at all, because the assets might have been all got in and distributed, whereas in a composition the debtor would remain liable to pay the composition. Why should we by construction import into the Act what is not to be found there, viz., a provision that the creditor is to be bound by the debtor's valuation of his security? If an action were brought by the creditor against the debtor for his debt, the debtor would plead the composition, and it might possibly be a sufficient excuse for not tendering the composition that the debtor did not know the amount upon which it was to be paid, but in any event the debt would not be discharged until the amount of the composition had been paid. The debtor would have to bring the amount into Court. It would be absurd to say that a creditor is bound by the composition and yet that it is not to be paid to him. I am of opinion that a secured creditor is entitled to prove his debt when he has realized his security, and then to receive the composition upon the balance which remains due to him.

Baggallay, J.A.

BAGGALLAY, J.A.:—

I am of the same opinion. Mr. *Taylor* relied very much on the

language of Form 39. That form, however, is headed "Debtor's Statement of Affairs for First Meeting," and it is intended for the double purpose of enabling the creditors to inform themselves of the state of the debtor's affairs, and of ascertaining the proper majority required for passing the resolutions, and for that purpose it is very important to know the value of the securities held by the secured creditors. But it was certainly not intended to bind the secured creditors by this valuation of their securities.

C. A. 1876 *In re* BESTWICK. *Ex parte* BESTWICK.

Solicitors for Debtors: *Pritchard, Englefield, & Co.*, agents for *Grundy & Kershaw, Manchester.*

Solicitor for Mortgagees: *H. A. Maude*, agent for *J. & G. E. Webster, Sheffield.*

In re WITT. *Ex parte* SHUBROOK.

C. A. 1876 *April* 6.

Custom of Trade—General Lien—Packer.

A packer is entitled to a general lien on the goods of his customer which are in his hands.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

G. A. Witt & Co., general merchants, filed a liquidation petition, under which *J. Shubrook* was appointed trustee. *Perrott & Perrott* were packers, and the debtors had been in the habit of employing them to pack goods for them for shipment abroad. The goods, when purchased by the debtors, were sent to the warehouse of *Perrott & Perrott*, where they were warehoused, packed, and sent off for shipment as directed by the debtors. At the commencement of the liquidation, *Perrott & Perrott* had in their warehouse various parcels of goods belonging to the debtors, which had been sent to them at different times, and there was due to them from the debtors the sum of £28 19*s.* 7*d.*, being the amount of their charges for packing other goods for the debtors. The trustee requested *Perrott & Perrott* to pack all the goods in one case and forward them to the docks for shipment. This was done, and their charge for doing it was £2 1*s.* They claimed to be entitled to a general lien on the goods, and refused to deliver them up except

C. A. 1876 — *In re* WITT. *Ex parte* SHUBROOK.

upon payment by the trustee, not only of the £2 1*s.*, but also of the £28 19*s.* 7*d.* The trustee tendered the £2 1*s.*, and demanded delivery of the goods, which was refused. He then applied to the Court for an order that *Perrott & Perrott* should deliver up the goods on payment of the £2 1*s.*

Statement.

Affidavits were made by two persons engaged in the trade of packers to the effect that by the custom of trade a packer has a general lien upon the goods of his customers in his possession for the amount of his charges, not only in respect of the particular goods, but also in respect of any other goods of the customer. In opposition to this evidence, one of the debtors made an affidavit in which he said that neither he nor his co-debtor knew of any such alleged custom of trade. The Registrar was of opinion that the lien claimed was established, and he dismissed the trustee's application with costs. The trustee appealed.

Argument.

Davey, Q.C., and *F. O. Crump*, for the Appellant:—

The Registrar founded his decision on *Ex parte Deeze* (1). In many text books, no doubt, that case has been treated as shewing that packers have a general lien, and the marginal note is to that effect. But when the case is looked at, it is evident that the marginal note is wrong, and that the decision was based upon the mutual credit clause. *Ex parte Ockenden* (2) and *Rose* v. *Hart* (3) shew that it was so. To establish a general lien by implication, it must be shewn, either that its existence was actually known to the person against whom it is claimed, or that it exists by virtue of a custom of trade so widely known that the Court will impute knowledge of it to him: *Holderness* v. *Collinson* (4). The law does not favour general lien: *Bock* v. *Gorrissen* (5). In the most recent text books on mercantile law, packers are not mentioned among the persons who have a general lien.

[*De Gex*, Q.C., for *Perrott & Co.*, referred to *Savill* v. *Barchard* (6), in which Lord *Kenyon* said that packers had a general lien, and to *Green* v. *Farmer* (7), in which Lord *Mansfield* said it

(1) 1 Atk. 228.
(2) Ibid. 235.
(3) 8 Taunt. 499.
(4) 7 B. & C. 212.
(5) 30 L. J. (Ch.) 39.
(6) 4 Esp. 53.
(7) 4 Burr. 2214.

was settled in 1755 that a packer, being in the nature of a factor, would be entitled to a lien.]

Argument.

That was because packers then often acted as factors, making advances to their principals, which they do not do now. In the recent case of *Achard* v. *Ring* (1), although an alleged custom had been in a prior case found judicially by the Court of Queen's Bench, yet, on the evidence, the jury, in accordance with the direction of *Cockburn*, L.C.J., found that the alleged custom did not exist.

De Gex, Q.C., and *Brough*, for the Respondents, were not called on.

JAMES, L.J. :—

Judgment, James, L.J.

I think it is too late now to attempt to set aside that which has been considered law for so many years, and I must say I do not see the injustice of it. I agree with what Lord *Hardwicke* said in *Ex parte Deeze* (2); it seems to me to be very good sense and justice. A man has goods in his possession which he has received in the ordinary course of trading, and he is asked to deliver them up, and at the same time he has a claim against the person who asks him to deliver them up. I think he has a perfect right to keep them. Under the Judicature Acts, I think, if an action were brought for the goods in trover or detinue, by means of a counterclaim the whole matter might be settled in one action. I certainly think this law with regard to lien is a very proper one; it has been settled for a great many years, and I do not see why we should endeavour to limit the effect of the decisions. The Registrar's order must be affirmed.

MELLISH, L.J. :—

Mellish, L.J.

I am of the same opinion. From what Lord *Mansfield* said in *Green* v. *Farmer* (3), and what was said by Lord *Hardwicke* in *Ex parte Deeze*, it seems to me clear that in the middle of the last century it was settled that a packer had a general lien. At that time packers were to a certain extent considered as factors; they used to make advances to their customers. But, it having been

(1) 31 L. T. (N.S.) 647.
(2) 1 Atk. 228.
(3) 4 Burr. 2214.

C. A. 1876 *In re* WITT. *Ex parte* SHUBROOK. Judgment, Mellish, L.J.

established that packers had a general lien at that time, I cannot think the circumstance that they do not now so frequently as they did then make advances should be sufficient to take away their right of general lien. It having been established that they had such a lien then, there can be little doubt that it would continue. Therefore, in the present case, if a single affidavit of the custom had been produced, that would have been sufficient evidence, if any evidence is required at all. If the existence of this lien is ever seriously to be contested, and it is sought to prove that by the present usage of trade packers have not a general lien, it must be done in quite a different way from merely bringing the customer himself to say that he never heard of the general lien. I think the determination of the Registrar was right.

BAGGALLAY, J.A.:—

I am of the same opinion.

Solicitors for Trustee: *W. A. Crump & Son.*
Solicitor for Packers: *G. H. Cole.*

C. A. 1876 *April* 12.

COOPER *v.* COOPER.

[1874 C. 153.]

Practice—Appeal—Staying Execution—Payment of Costs—Rules of Court, 1875, *Order* LVIII., *rr.* 16, 17.

4 Ch D. 388
9 Ch D 46.
3 C & D. 203,
24 Ch D 306
316

An appeal was brought by a Defendant from a decree which, *inter alia*, ordered him to pay costs. On motion to stay proceedings pending the appeal, order made on payment into Court by the Defendant of the costs below and on payment of the costs of the application to stay.

A motion before the Court of Appeal under Rules of Court, 1875, Order LVIII., rule 17, is not an appeal, but an original motion.

The rule in *Merry* v. *Nickalls* (1) is still in force.

Statement.

THE Vice-Chancellor *Bacon* had in this suit made an order for payment of a certain annuity, and had directed one of the Defendants to pay the costs of the suit. This Defendant had given

(1) Law Rep. 8 Ch. 205.

notice of motion before the Court of Appeal that the order so made might be discharged, and then moved before the Vice-Chancellor *Bacon* that all proceedings under the decree might be stayed pending the motion of appeal. The Vice-Chancellor *Bacon* refused, and the same motion was now made before the Court of Appeal.

C. A. 1876 COOPER v. COOPER.

Chester, for the Appellant, referred to Order LVIII., rules 16 and 17. Argument.

MELLISH, L.J., said that motions before the Court of Appeal under Order LVIII., rule 17, were not appeals, but were really original motions.

Willis-Bund, for the Respondent, made no objection to the costs being paid into Court instead of to his client.

Sir *H. Jackson*, Q.C., *amicus curiæ*, referred to *Burdick* v. *Garrick* (1) and *Atherton* v. *British Nation Assurance Company* (2).

THE COURT (*James*, L.J., *Mellish*, L.J., and *Baggallay*, J.A.) thought that proceedings ought to be stayed on the Appellant paying into Court the costs ordered to be paid, and paying to the Plaintiffs the costs of the application. There was no alteration in the practice as to the payment of costs in such cases, and *Merry* v. *Nickalls* (3) ought to be followed. Judgment.

Solicitors: *A. A. Silberberg*; *Yeo & Warner*.

(1) Law Rep. 5 Ch. 453. (2) Law Rep. 5 Ch. 720.
(3) Law Rep. 8 Ch. 205.

M. R.

1876

Feb. 11.

UNDERHILL *v.* RODEN.

[1875 U. 9a.]

Will—Gift over on Wife's Second Marriage—Death of Wife without marrying again—Words "Children and Issue and their Heirs"—Estates Tail—Rule in Wild's Case.

7 Ch. D. 136.

Testator gave his real and personal estate to a trustee upon trust to pay the proceeds to his wife for the maintenance and education of his children until the eldest should attain twenty-five, or until his wife should marry again; and, in case of her second marriage before any of his children should attain twenty-five, to pay her £30 a year, and apply the residue towards the maintenance and education of his children; and when his two sons should attain twenty-five, then to raise certain sums for them, and pay the proceeds of the residue to his wife if she should be then unmarried, but in case she should marry again, then, after providing an annuity for her for her separate use, to pay the residue equally between the testator's children and their issue and their heirs as tenants in common; and in case both his children should die under twenty-five without leaving issue, then to give the proceeds to his wife for life; and after her death the said property to be in trust as to one moiety for the wife, and as to the other for the trustee absolutely.

The wife survived the testator and died without having married again, leaving the testator's only two sons surviving, who had since attained twenty-five, but who had no issue:—

Held, that the gift over of the real estate on the second marriage of the wife took effect on her death:

Held, also, that the sons took equitable estates tail according to the rule in *Wild's Case* (1).

Pile v. *Salter* (2) disapproved.

Statement.

SPECIAL CASE.

Richard Roden, by his will, dated the 23rd of November, 1852, appointed the Plaintiff, *John Underhill*, his executor, and gave, devised, and bequeathed all his real and personal estate to the said *J. Underhill* upon trust to pay the rents and profits of his real estate, and also the interest, dividends, and annual income of his personal estate to his wife for her maintenance and support, and for the education and support of his children till the eldest should attain twenty-five years, or until his wife should marry again, whichever event should first happen: And, in case of the second marriage of his said wife before any of his children should attain

(1) 6 Rep. 16 b. (2) 5 Sim. 411.

twenty-five years, he directed his said trustee to pay to his wife £30 a year out of the proceeds of his real and personal estate, the residue of the said proceeds to be applied towards the maintenance, education, and support of such of his children as should then be living; and, when his eldest son attained twenty-five, he directed that the said trustee should raise the sum of £700 by sale, or mortgage, or otherwise of his said real and personal estate, and pay the same to his eldest son for his own absolute use, and a like sum in like circumstances for his second son; but in case only one of his said sons should live to attain the age of twenty-five years, his trustee was to raise the sum of £1400 for the absolute use of such only son: And when his said sons, or such survivor of them, should have attained the age of twenty-five years, the trustee was to pay the proceeds of the residue of the said real and personal estate, after raising the said sums of £700 and £700, or the said sum of £1400, to his said wife for her life in case she should then be unmarried, but in case she should marry again, then the trustee was to sell and invest so much of the said real and personal estate as should produce £30 a year, and pay the same to his wife for her separate use, and should pay the residue of his said real and personal estate unto and equally between his said children and their issue, and their heirs and assigns, share and share alike as tenants in common and not as joint tenants; and in case of the death of both of his said children before attaining their respective ages of twenty-five years without leaving lawful issue, the trustee was to pay the whole of the said proceeds of his real and personal estate to his said wife for her life and separate use, and after her decease his said trustee was to hold the real and personal estate to the uses thereinafter declared, that was to say, as to one moiety, as his wife should by deed or will appoint, and in default of and subject thereto, to the use of his said wife, her heirs and assigns for ever; and in case the said *J. Underhill* should be living at the death of his said wife, in case his said children should have died before attaining their respective ages of twenty-five years without leaving lawful issue, then as to the other remaining moiety, to the use of the said *J. Underhill*, his heirs, executors, administrators, and assigns for ever: But in case of the decease of the said *J. Underhill* before the happening

M. R. 1876 UNDERHILL v. RODEN. Statement.

of the said event lastly thereinbefore provided for, then to the use of and amongst all and every the child or children of the said *J. Underhill* who should be living at his decease, and their issue, share and share alike as tenants in common and not as joint tenants.

The testator died in December, 1852, having had two sons only, the Defendants *F. W. Roden* and *R. J. Roden*.

The testator's widow died in May, 1853, without having married again; the two sons were then both under age, but had since respectively attained the age of twenty-five.

The said sums of £700 in the will mentioned had not yet been raised.

At the time of his death the testator was seised of a certain freehold property called "*The Moor*," which formed the whole of his estate.

The questions submitted for the opinion of the Court in the special case were:—

1. Whether the said *F. W. Roden* and *R. J. Roden* and their issue, or any of them, took any, and if any, what, estate in *The Moor* under the said will of the testator?

2. Whether the said *F. W. Roden* took any, or what estate in *The Moor* as heir-at-law of the testator?

3. Whether the legal estate in fee in *The Moor* is now vested in the said *J. Underhill* under the said will?

Argument.

Plumptre, for the trustee.

Manby, for the eldest son, the heir-at-law:—

The gift over on the contingency of the wife's second marriage has failed by reason of her death without having married again. This is not one of the cases like *Luxford* v. *Cheeke* (1) and *Gordon* v. *Adolphus* (2), where the wife's second marriage can be construed as if it were second marriage or death, for here the testator directs an annuity to be raised and paid to his wife in the event of her second marriage.

The case is governed by *Pile* v. *Salter* (3). There a testator

(1) 3 Lev. 125. (2) 3 Bro. P. C. 306.
(3) 5 Sim. 411.

made certain bequests to his wife in trust for her as long as she remained a widow, and upon her marrying again he bequeathed to her one-third of his property not then disposed of, and the remaining two-thirds to her nieces. The widow died without having married again, and it was held that the residue was undisposed of. That case was referred to in *Eaton* v. *Hewitt* (1). I contend that there is an intestacy, and that the heir-at-law is entitled.

B. B. Rogers, for the second son:—

The two sons are entitled to estates tail according to the rule in *Wild's Case* (2).

JESSEL, M.R.:— Judgment.

It is a great pity when a general rule of this kind is well established that Judges should not follow it. The general rule is extremely well expressed, if I may say so, in *Eaton* v. *Hewitt* by a very distinguished Judge in these terms: "It is a rule now well established that where a testator gives to a woman a life interest if she so long remains unmarried, and then directs that in the event of her marrying the property shall go over to another, although, according to the strict language, the gift over is expressed only to take effect in the event of the marriage of the tenant for life, the gift over is held to take effect, even though the tenant for life does not marry."

The rule is again stated thus by another distinguished Judge in *Browne* v. *Hammond* (3): "It appears to me clear that I am concluded by the authorities which have determined that a devise or bequest over, though in terms made upon the marriage of the donee of the preceding estate, is to be extended by implication, so as to take effect on the determination of that estate by death." In that case the gift was to the wife so long as she should remain the testator's widow, without being expressly for her life.

Against these authorities there is the case of *Pile* v. *Salter* (4), which appears to me wrongly decided. It was cited in both the

(1) 2 Dr. & Sm. 184, 192. (3) Joh. 210, 214.
(2) 6 Rep. 16 b. (4) 5 Sim. 411.

M. R. 1876 UNDERHILL v. RODEN. Judgment.

cases I have mentioned, and not followed. In that case the Vice-Chancellor *Shadwell*, referring to the contention that the gift took effect upon the widow marrying again or dying, said: "It would be absurd to give her one-third of the property in the event of her death." I am at a loss to see any absurdity in it. Is there anything absurd in giving a person a life interest in the whole of the property, and an absolute interest in part? The fact is, the testator was contemplating two different things, the one a provision for his wife during her life, and the other a disposition of the corpus after her death.

If a case exactly similar to *Pile* v. *Salter* (1) had come before me, I should have considered that it was not in accordance with the general rule, and should therefore have declined to follow it. But in this case there are strong reasons for holding that the gifts over on the wife's second marriage take effect on her death, independently of the general rule; for though the House of Lords has decided that we cannot in the slightest degree impugn any well-established rules of construction, yet it has also decided that every case must be decided on its own words where not covered by authority.

The testator, after directing his trustee to pay the annual proceeds of the residue of the real and personal estate (after raising the two sums of £700 for his sons) to his wife for her life, "in case she should then be unmarried," directs that, "in case she should marry again," then the trustee should sell so much of the said real and personal estate as should produce £30 a year, and pay the same to his wife for her separate use, and pay the residue unto and equally among his children. It might have been said that the word "then" meant not "at that time," but "in that case." I assume, however, that the meaning is "at that time." Then, in case of the death of both his sons under twenty-five without leaving issue, he directs the trustee to pay the proceeds of his estate to his wife for life, and as to one moiety, as she shall by deed or will appoint. As regards that moiety there is no absurdity in the disposition. Then, as to the other moiety, the testator directs that in case *John Underhill* should be living at the death of his wife, in case his children should have died before attaining

(1) 5 Sim. 411.

M. R.
1876
UNDERHILL v. RODEN.
Judgment.

the age of twenty-five without leaving lawful issue, then his trustee should hold the remaining moiety to the use of *John Underhill* absolutely.

Can anything be more capricious than to suppose that the ultimate gift to *John Underhill* was dependent on the wife's marrying again, an event with which he had nothing to do? Or why should the wife's own interest in the moiety depend upon her marrying again? The result is, that the gift over takes effect on the death of the wife as well as on her marrying again. I am of opinion that the legal estate in *The Moor* is in the trustee, as he is directed to raise the sum by sale or mortgage, and that the two sons take equitable estates tail according to the rule in *Wild's Case* (1).

Solicitor: *H. G. Field*, agent for *H. & J. E. Underhill, Wolverhampton.*

LYSAGHT *v.* EDWARDS.

[1875 L. 20a.]

M. R.
1876
March 17, 20.

Vendor and Purchaser—Contract to sell Real Estate—Death of Vendor before Completion—General Devise of Real Estate upon Trust for Sale—Devise of Trust Estates.

In 1874 the Plaintiffs entered into a contract for the purchase of real estate. After the title had been accepted, and before completion, the vendor died, having by his will (dated in 1873) given his personal estate to *E.*, whom he appointed executor, and devised all his real estate to *H.* and *M.* upon trust for sale, and having also devised to *H.* alone all the real estate which at his death might be vested in him as trustee:—

Held, that the real estate contracted to be purchased by the Plaintiffs passed to *H.* under the devise of trust estates.

Wall v. *Bright* (2) commented on and explained.

Statement.

ON the 23rd of December, 1874, an agreement in writing was entered into between *Samuel Bedford Edwards* and the Plaintiffs, whereby *S. B. Edwards* agreed to sell, and the Plaintiffs agreed to purchase, at the price of £59,750, a mansion-house called *The Bury*, and certain messuages, farms, and lands (comprising in the whole 775A. 1R. 36P.), situate in the parish of *Arlsey*, in the

(1) 6 Rep. 16 b. (2) 1 Jac. & W. 494.

M. R.
1876
LYSAGHT
v.
EDWARDS.
Statement.

county of *Bedford*, partly freehold and partly copyhold. The agreement provided that the vendor should, before the completion of the purchase, procure the copyholds to be enfranchised; that £3000, part of the purchase-money, should be paid at once, and the residue on the 11th of October, 1875; and that on payment of the balance of the purchase-money the vendor should execute a proper conveyance.

Part of the property which formed the subject of the contract consisted of a farm and lands called the *Bury Farm*.

The deposit of £3000 was duly paid. An abstract of title was delivered, and, after requisitions had been made thereon, the title was accepted by the Plaintiffs on the 1st of May, 1875.

S. B. Edwards died on the 12th of June, 1875, having made a will dated the 22nd of July, 1873, which, so far as material, was as follows:—

"I appoint my wife, *Emily Clara Charlotte*, sole executrix of this my will. I give to my wife all my personal property whatsoever and wheresoever. I bequeath to each of my trustees hereinafter named the legacy of £100. Also I bequeath the legacy of £2000 to my cousin, *Elizabeth Barwick*. I charge such part of my real estate as consists of my messuage, farms, and lands at *Arlsey* aforesaid, called the *Bury Farm*, in exoneration of my personal estate, with the payment of my debts and of the pecuniary legacies aforesaid, and subject to the trust hereinafter contained for sale of the same hereditaments, and to the power of postponing such sale. I direct the said debts and legacies to be raised under the statutory power for that purpose. I devise to my cousin, *Egerton Hubbard*, of *Addington Manor*, in the county of *Buckingham*, and my friend, Mr. *William Muller*, junior, of No. 4, *St. Helen's Place*, *Bishopsgate Street*, their heirs and assigns, all my real estate whatsoever and wheresoever of freehold tenure (except such hereditaments as are now vested in trustees for sale under and by virtue of a certain indenture of settlement dated the 30th day of March, 1830, and certain indentures indorsed thereon), and my beneficial interest in such excepted hereditaments. And I give and devise such part of my real estate as is of copyhold tenure to the use of such person or persons, and in such manner as the said *Egerton Hubbard* and *William Muller*, junior, or the

survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of this my will shall, by any deed or deeds for the purpose of carrying into effect any sale which shall be made under the trust hereinafter declared, appoint. And I give to the said *Egerton Hubbard* and *William Muller*, junior, their executors and administrators, all net moneys and proceeds to arise by sale of the said freehold and copyhold hereditaments respectively vested and covenanted to be vested in trustees in that behalf under and by virtue of the said indentures upon the trusts hereinafter mentioned. And I declare that the said *Egerton Hubbard* and *William Muller*, junior, or the survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of this my will, hereinafter called my trustees or trustee, shall sell and convert into money the said real estate hereinbefore devised as soon as conveniently may be after my death (but subject to the proviso hereinafter contained in regard to the said sale), and shall, with and out of the moneys to arise by such sale as last aforesaid, and of the net moneys and proceeds to arise by sale under and by virtue of the said settlement, pay my funeral and testamentary expenses, my debts, and the pecuniary legacies aforesaid, and shall invest the residue of the said moneys in or upon some or one of the modes of investment prescribed by the power in that behalf hereinafter contained, and shall stand possessed of the said moneys and investments in trust for my wife during her life, and after her death" upon certain trusts therein mentioned. And the will then proceeded as follows: "Provided and I declare my said trustees or trustee shall be at liberty to postpone the sale of my real estate hereinbefore devised, or any part thereof, as they or he, on the request in writing of my wife, shall think fit; and during the suspense of such sale I empower my said trustees or trustee to permit my wife to occupy my mansion and such of the land and grounds occupied therewith as she may require, so long as she shall think fit, and to let all such other parts of my real estate hereinbefore devised for the time being remaining unsold, by demising the same from year to year, or for any number of years not exceeding ten years, at rack or improved yearly rents, and on the usual conditions. And I direct

M. R.
1876
LYSAGHT
v.
EDWARDS.
Statement.

my said trustees to apply such part of the said rents as may be necessary for the purpose in and about the repair of any part of my real estate, consisting of houses, buildings, and fences adjoining any part thereof, and insuring the same, or such of them as for the time being shall remain unsold, against loss or damage by fire. And I hereby declare that the rents of my real estate hereinbefore devised and for the time being remaining unsold, subject to such application thereof as hereinbefore mentioned, and after payment of interest on any moneys hereby authorized to be raised on mortgage, shall be paid and applied by my said trustees or trustee in the same manner as the income of the residue of net moneys and investments will be applicable when my real estate shall have been sold and invested. And I devise to the said *Egerton Hubbard*, his heirs and assigns, all real estate which at my death may be vested in me as trustee, subject to the trusts affecting the same."

The enfranchisement of the copyholds comprised in the grant had not been completed at the death of *S. B. Edwards*, who was himself the tenant on the Court rolls.

Upon the death of *S. B. Edwards* the question arose whether the concurrence of his heir-at-law or customary heir was necessary in order to give a complete title and conveyance to the Plaintiffs; and in order that it might be decided an action for specific performance was commenced by the Plaintiffs against *Emily Clara Charlotte Edwards*, *Egerton Hubbard*, and *William Muller*, and the question was then raised by a special case under the Rules of Court, 1875, Order XXXIV. rule 2.

Argument.

Cookson, Q.C., and *Cozens-Hardy*, for the Plaintiffs:—

A devise of trust estates does not pass estates in which the testator had a beneficial interest, or, at all events, of which he was merely a constructive trustee: *Wall* v. *Bright* (1); *Purser* v. *Darby* (2); *In re Cuming* (3). In such cases as the present, the heir-at-law cannot be treated as a trustee until a decree for specific performance has been obtained: *In re Carpenter* (4); *Cresswell* v. *Haines* (5); *Goold* v. *Teague* (6). This is the general understand-

(1) 1 Jac. & W. 494.
(2) 4 K. & J. 41.
(3) Law Rep. 5 Ch. 72.
(4) Kay, 418.
(5) 10 W. R. 121.
(6) 5 Jur. (N.S.) 116.

ing of conveyancers: *Davidson's* Conveyancing (1); and it is borne out by *Thirtle* v. *Vaughan* (2); *Martin* v. *Laverton* (3).

If the legal estate does not pass under the devise of trust estates, it cannot pass under the general devise contained in the will, which is a devise to trustees upon trust to sell in pursuance of directions thereinafter given, not to carry out a sale made by the testator. The trustees are not the legal personal representatives of the testator, and consequently cannot give a receipt for the purchase-money due from the Plaintiffs. Even if the trustees took the legal estate in the freeholds under the general devise, they have no legal estate in the copyholds, over which the testator gives them a mere power of appointment.

Chitty, Q.C., and *Kekewich*, for the Defendants:—

We say that the legal estate passed under the devise of trust estates. The most difficult portion of the case relates to the *Bury Farm*, and even as regards it we contend that it did not pass under the general devise upon trust for sale. The will must be read as if it had been executed immediately before the death of the testator. It contains no specific devise of *Bury Farm*, nor any specific description of real estate. The words, "subject to the trusts for sale hereinafter contained" must be read "subject to the trusts hereinafter contained so far as they affect the same."

The question whether real estate contracted to be sold passes at law under a devise of trust estates depends on the question whether there was a binding contract for sale at the death of the testator. If there was a binding contract, the legal estate passes: *Rose* v. *Watson* (4); *Shaw* v. *Foster* (5). Here the title had been accepted in the testator's lifetime, and there can be no question that the contract was binding at his death.

Cookson, in reply.

JESSEL, M.R.:—

This case is an illustration, if another illustration were wanting,

(1) 2nd Ed. vol. iv. p. 56.
(2) 2 W. R. 632; 24 L. T. (O.S.) 5.
(3) Law Rep. 9 Eq. 563.
(4) 10 H. L. C. 672.
(5) Law Rep. 5 H. L. 321.

John M.S. 97

M. R.
1876
LYSAGHT
v.
EDWARDS.
Judgment.

of the great difficulties which arise from deciding cases for the purpose of convenience, instead of allowing the Legislature to intervene for the purpose of correcting any defects in the law. Had it not been for the case of *Wall* v. *Bright* (1), I should not have thought the present special case arguable. As it is, I confess that I decide it with something like hesitation, not because I doubt at all as to the way in which it ought to be decided, but because I cannot help thinking that it is impossible for me at this distance of time to say that *Wall* v. *Bright*, as decided, is not law, and that I must consider what the effect of that case is, not merely having regard to the facts of it, but also having regard to the reasons given by the learned Judge who pronounced it, and to the effect which that case may have had upon subsequent titles, and the practice of conveyancers. Notwithstanding that, I cannot help considering this case in the first instance independently of that decision, and stating the conclusion I should have come to without that decision, and the reasons for it; and then I shall take into consideration the effect, if any, which that case ought to have upon my ultimate decision.

In this particular case the testator made his will on the 22nd of July, 1873. He was at that time owner in fee of certain freehold estates, and he was also owner of certain copyhold estates. Among his estates was a farm called *Bury Farm*, partly freehold and partly copyhold. By his will he charges such part of his real estates as consisted of the *Bury Farm*, with debts and pecuniary legacies, and he proceeds: "Subject to the trusts hereinafter contained for sale of the same hereditaments, and to the power of postponing such sale, I direct the said debts and legacies to be raised under the statutory power for that purpose." Then he gives to two gentlemen, named *Hubbard* and *Muller*, all his real estate, with a certain exception, which it is not material to mention, and he devised all his copyhold estates to the use of such persons as they might appoint for the purpose of carrying into effect any sale which should be made under the trusts thereinafter declared, and then he gave them the net proceeds of the sale upon the trusts therein mentioned. There is, therefore, a gift of the freehold estate upon trust to sell, and of the copyhold to such uses

(1) 1 Jac. & W. 494.

as they shall appoint for the purpose of effecting a sale. That is the conveyancer's form of the trust for sale of freehold and copyhold estates, the difference of form being merely to avoid the necessity of a double admission to the copyholds. The trustees are to convey the copyholds to the purchaser directly in order to avoid the expense of two fines. Then there is a power to postpone the sale; and, last of all, there is this devise: "And I devise to the said *Egerton Hubbard*, his heirs and assigns, all real estate which at my death may be vested in me as trustee subject to the trusts affecting the same." After the date of his will, he entered into a contract of sale dated the 23rd of December, 1874. It was an ordinary contract of sale. A deposit of £3000 was paid, and requisitions on the title were sent in in the usual way; but eventually the title was finally accepted by the Plaintiffs on the 1st of May, 1875. The testator, the vendor, died on the 12th of June, 1875; and, under those circumstances, the question which I have to decide is, there being a difficulty in finding the heir-at-law or customary heir of the testator, whether the trustees *Hubbard* and *Muller*, or the trustee *Hubbard*, takes the legal estate in the freehold and copyhold lands which have been sold.

Now, the first question to be considered is, What is the meaning of the will itself? The new *Wills Act* says that unless a contrary intention appears by the will, the will is to speak from the death of the testator as to the real and personal estate comprised in it. In other words, in the absence of a contrary intention, you are to read a general gift of real estate as being equivalent to "all the real estate which I shall be entitled to at the time of my death" in the same way as you always read a general gift of personal estate. In this particular instance the testator has used these very words as regards trust estates: as to them he has only given those which at the time of his death may be vested in him as trustee. It appears to me that there is nothing in this will to exempt the real estate from the operation of the statute, and it must be read as a gift of all the real estate "to which I shall be entitled at the time of my death." No one can doubt for a moment that the after-acquired real estate would have passed under those words, and would have been subject to the trusts for sale.

That being so, the next point I have to consider is, What is

M. R. 1876 LYSAGHT v. EDWARDS. Judgment.

8 Ch D 630
9 Ch D 583
19 Ch D 572.

the effect of the contract? It appears to me that the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of Lord *Hardwicke*, who speaks of the settled doctrine of the Court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession. In other words, the position of the vendor is something between what has been called a naked or bare trustee, or a mere trustee (that is, a person without beneficial interest), and a mortgagee who is not, in equity (any more than a vendor), the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, viz., possession of the estate and a charge upon the estate for his purchase-money. Their positions are analogous in another way. The unpaid mortgagee has a right to foreclose, that is to say, he has a right to say to the mortgagor, "Either pay me within a limited time, or you lose your estate," and in default of payment he becomes absolute owner of it. So, although there has been a valid contract of sale, the vendor has a similar right in a Court of Equity; he has a right to say to the purchaser, "Either pay me the purchase-money, or lose the estate." Such a decree has sometimes been called a decree for cancellation of the contract; time is given by a decree of the Court of Equity, or now by a judgment of the High Court of Justice; and if the time expires without the money being paid, the contract is cancelled by the decree or judgment of the Court, and the vendor becomes again the owner of the estate. But that, as it appears to me, is a totally different thing from the contract being cancelled because there was some equitable ground for setting it aside. If a valid contract is cancelled for non-payment of the purchase-money after the death of the vendor, the property will still in equity be treated as having been converted into personalty, because the contract was valid at his death; while in the other case there will not be conversion, because there never was

in equity a valid contract. Now, what is the meaning of the term "valid contract?" "Valid contract" means in every case a contract sufficient in form and in substance, so that there is no ground whatever for setting it aside as between the vendor and purchaser—a contract binding on both parties. As regards real estate, however, another element of validity is required. The vendor must be in a position to make a title according to the contract, and the contract will not be a valid contract unless he has either made out his title according to the contract or the purchaser has accepted the title, for however bad the title may be the purchaser has a right to accept it, and the moment he has accepted the title, the contract is fully binding upon the vendor. Consequently, if the title is accepted in the lifetime of the vendor, and there is no reason for setting aside the contract, then, although the purchase-money is unpaid, the contract is valid and binding; and being a valid contract, it has this remarkable effect, that it converts the estate, so to say, in equity; it makes the purchase-money a part of the personal estate of the vendor, and it makes the land a part of the real estate of the vendee; and therefore all those cases on the doctrine of constructive conversion are founded simply on this, that a valid contract actually changes the ownership of the estate in equity. That being so, is the vendor less a trustee because he has the rights which I have mentioned? I do not see how it is possible to say so. If anything happens to the estate between the time of sale and the time of completion of the purchase it is at the risk of the purchaser. If it is a house that is sold, and the house is burnt down, the purchaser loses the house. He must insure it himself if he wants to provide against such an accident. If it is a garden, and a river overflows its banks without any fault of the vendor, the garden will be ruined, but the loss will be the purchaser's. In the same way there is a correlative liability on the part of the vendor in possession. He is not entitled to treat the estate as his own. If he wilfully damages or injures it, he is liable to the purchaser; and more than that, he is liable if he does not take reasonable care of it. So far he is treated in all respects as a trustee, subject of course to his right to being paid the purchase-money and his right to enforce his security against the estate. With those exceptions, and his

M. R. 1876 LYSAGHT v. EDWARDS. Judgment.

right to rents till the day for completion, he appears to me to have no other rights.

Upon this point I shall merely refer to two authorities. First, in the case of *Hadley* v. *London Bank of Scotland* (1), I find this passage in the judgment of Lord Justice *Turner*: "I have always understood the rule of the Court to be that if there is a clear valid contract for sale the Court will not permit the vendor afterwards to transfer the legal estate to a third person, although such third person would be affected by *lis pendens*. I think this rule well founded in principle, for the property is in equity transferred to the purchaser by the contract; the vendor then becomes a trustee for him, and cannot be permitted to deal with the estate so as to inconvenience him."

In *Shaw* v. *Foster* (2) the general proposition is, I think, laid down by every one of the noble Lords who made a speech on that occasion. Lord *Chelmsford* says (3): "According to the well-known rule in equity, when the contract for sale was signed by the parties Sir *William Foster* became a trustee of the estate for *Pooley*, and *Pooley* a trustee of the purchase-money for Sir *William Foster*." Lord *Cairns* says (4): "Under these circumstances, I apprehend there cannot be the slightest doubt of the relation subsisting in the eye of a Court of Equity between the vendor and the purchaser. The vendor was a trustee of the property for the purchaser; the purchaser was the real beneficial owner, in the eye of a Court of Equity, of the property, subject only to this observation, that the vendor, whom I have called the trustee, was not a mere dormant trustee, he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it. The relation, therefore, of trustee and *cestui que trust* subsisted, but subsisted subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property"—that interest being, as I said before, a charge or lien upon the property for the amount of the purchase-money. Lord *O'Hagan* says (5): "By the contract of sale the

(1) 3 D. J. & S. 63, 70. (3) Law Rep. 5 H. L. 333.
(2) Law Rep. 5 H. L. 321. (4) Ibid. 338.
(5) Law Rep. 5 H. L. 349.

vendor, in the view of the Court of Equity, disposes of his right over the estate, and on the execution of the contract he becomes constructively a trustee for the vendee, who is thereupon on the other side bound by a trust for the payment of the purchase-money"—that is, perhaps, not quite accurate—it is not "a trust for the payment of the purchase-money," but it is a charge or lien—however, he meant the same thing—"or, as Lord *Westbury* has put it in *Rose* v. *Watson* (1), 'When the owner of an estate contracts with a purchaser for the immediate sale of it, the ownership of the estate is in equity transferred by that contract.' This I take to be rudimental doctrine, although its generality is affected by considerations which to some extent distinguish the position of an unpaid vendor from that of a trustee," by which I understand him to mean "a mere trustee." He has already said that he is a trustee, and he is not now distinguishing the vendor's position from that of a trustee, but distinguishing it from that of some other kinds of trustees. His Lordship continues: "Thus, as it is stated by the Master of the Rolls in *Wall* v. *Bright* (2), 'The vendor is not a mere trustee; he is in progress towards it'"—that is, towards being a mere trustee—"'and finally becomes such when the money is paid, and when he is bound to convey.'" The Lord Chancellor (Lord *Hatherley*) says (3): "My Lords, I should stop here, and not say a word more, were it not for what I consider to be a very singular misapprehension which occurred with reference to some expressions in my judgment, and which expressions have occasioned the infliction upon your Lordships (for which I am sure I owe the House an apology) of the citation of authorities to prove the elementary proposition that the moment that a contract for sale and purchase is entered into, and the relation of vendor and vendee is constituted, the vendor becomes a constructive trustee for the vendee. It is but a constructive trust." He uses the expression, "the vendor becomes a constructive trustee for the vendee," and then he goes on to say that he thinks, upon consideration, that he had not gone beyond the view of Sir *Thomas Plumer*; and he disposes of that by saying he thinks his own expressions were not different from those of Sir *Thomas*

(1) 10 H. L. C. 678. (2) 1 Jac. & W. 508.
(3) Law Rep. 5 H. L. 356.

M. R. 1876 LYSAGHT v. EDWARDS. Judgment.

Plumer. It is immaterial to consider that; for he states the doctrine in perfect accordance with every one of the other noble Lords, including Lord *O'Hagan*, if you correct the expression of Lord *O'Hagan* in the manner in which I am sure he would have corrected it himself had his attention been called to it.

It must, therefore, be considered to be established that the vendor is a constructive trustee for the purchaser of the estate from the moment the contract is entered into.

What, then, is there on the other side? I will, first of all, dispose of the case of *Purser* v. *Darby* (1). In that case *Joseph Darby*, being seised in fee of certain closes of land, agreed in September, 1855, to sell them to the Plaintiffs. Afterwards, on the 9th of June, 1856, *Joseph Darby* made his will, and thereby devised all his share, right, and interest in the land (that is a specific devise), of which the closes contracted to be sold formed part, to his sons, the Defendants (two of whom were still infants), and their heirs, as tenants in common, subject to the payment of all debts, &c. Then there was a devise of the testator's mortgage and trust estates to two of his sons, whom he also appointed executors of his will. He died without completing the contract, and the bill was filed for specific performance. Mr. *Bernard*, for the Defendants, submitted that this was not a case for costs, and he said: "At the date of his will the testator was *quoad* the property he had contracted to sell a trustee for the Plaintiffs, and he had taken the precaution of devising all his mortgage and trust estates." Then the Vice-Chancellor is reported to have said: "But, so far as regards the property comprised in the contract, he was merely a constructive trustee." That is the same doctrine as in all the same cases, and there would have been no difficulty if he had stopped there, but he proceeds thus: "I have held—and the decision has been since affirmed—that where there is merely a constructive, and not an express trust, a devise of trust estates does not supersede the necessity of a decree." I confess that I am unable to understand clearly what this means; nor has the learned counsel who cited it, with all his ingenuity, been able to explain it. The answer to Mr. *Bernard's* argument appears to me to be this, there was a specific devise of the land in question, and it could

(1) 4 K. & J. 41.

not possibly, therefore, have passed under the devise of trust estate; because although the testator had no right to charge this particular property with his debts, and if the devise had been a general devise the charge of debts might have shewn that, being a trust estate, it was not intended to pass, still, where you devise it specifically, it must pass at law, and you cannot get rid of the specific description of the property by saying that there is a charge upon it which the testator had no right to make. It is altogether, if I may say so, out of the authorities which I shall presently consider. Upon the whole, I think the Vice-Chancellor must mean, though I am not sure about it, that where an infant or a lunatic, that is, a person under disability, would take the estate if the contract were not established in a Court of Equity, there the purchaser cannot safely complete without establishing the validity of the contract by decree; and if that be the meaning, the case does not militate in the least against the other decisions.

In another case of *Thirtle* v. *Vaughan* (1) which came before the same Vice-Chancellor there was a contract for sale, and the vendor died before the purchase was completed, having, by his will, given the residue of his real and personal property to his children equally to be divided between them as tenants in common, with a gift over if either of them died under twenty-one. The question was whether, it being a general devise, the gift over shewed that trust estates were not included; and Vice-Chancellor *Wood* said "He thought that this case was distinguishable from those cases which had decided that the fact of a general devise being to persons as tenants in common was not sufficient by itself to prevent trust estates from passing under it. Here there was the additional clause providing for accruer, and the wording of it was such that it was difficult to come to any other conclusion than that the testator was referring to beneficial interests only. He must therefore hold that the legal estate in the property did not pass by this devise, but had descended on the heir, who would be declared a trustee." That is, there being a valid contract for sale, he decided that it bound the estate, but that the words of the devise were not sufficient to pass it, because it was a trust estate, and the expressions used in the devise (it being a general devise) were

(1) 2 W. R. 632.

M. R. 1876 LYSAGHT v. EDWARDS. Judgment.

inconsistent with the notion that the testator intended to dispose of estates of which he was a constructive trustee. That case of *Thirtle* v. *Vaughan* (1) was also followed and approved of by Vice-Chancellor *Malins* in *Martin* v. *Laverton* (2).

Now, what is the doctrine to which Vice-Chancellor *Wood* referred in *Thirtle* v. *Vaughan?* It rests upon two leading cases, which I need not do more than mention, namely, *Lord Braybroke* v. *Inskip* (3) and *Roe* v. *Reade* (4), which have established this, that a general devise of real estate, like every other clause in the will, must be construed according to its ordinary meaning, that the use of the words "my real estate" (that is, the use of the word "my" prefixed to "real estate") is not of itself sufficient to shew that the real estate which the testator had at law only would not pass as well as real estate to which he was entitled either beneficially or legally and beneficially. Where you get a devise of "my real estate," or "my freehold estate," or anything in the shape of a general as distinguished from a specific devise of land, where a particular parcel of land is spoken of by a particular description, there you may control the words "my real estate" by the context, and, as in other cases, restrict their meaning to real estates in which the testator has a beneficial interest by force of the context; and if you find that the context consists of restrictions and limitations which are wholly inconsistent with the notion that the testator was dealing with the trust estate either because he would have had no power so to deal with the trust estate, or because so dealing with it it would be a breach of trust, you avail yourself of these restrictions and limitations to say that that is the context which shews that the testator, in speaking of "my real estates," did not mean "the real estates which I am entitled to at law only," but "the estates to which I am beneficially entitled." What particular words will produce this result it is immaterial now to consider. It has been said that a charge of debts and legacies is sufficient, because the testator has no power to charge the estate of which he is trustee with debts and legacies. It may be that limitations in strict settlement are sufficient, because a testator would be guilty of a gross dereliction of duty if

(1) 2 W. R. 632.
(2) Law Rep. 9 Eq. 563.
(3) 8 Ves. 417.
(4) 8 T. R. 118.

he devised a trust estate in strict settlement. But, whatever the words may be, they are only used by the Court as a reason for cutting down the primary meaning of the words "my real estate" to mean "the real estate to which I am beneficially entitled," or, as I should say, under the new *Wills Act*, "the real estate to which I shall be beneficially entitled at the time of my death." That being so, the question arose, in the case of *Wall* v. *Bright* (1), whether the words used in that particular case were sufficient to shew that the testator did intend the words "my real estate" to mean "the real estate to which I am beneficially entitled." That was the real question decided in the case of *Wall* v. *Bright*.

Now, the first observation to be made upon *Wall* v. *Bright* is this, that there was no gift of trust estates. The Court was not embarrassed there by having to choose between two devises. It was not a devise of "all my real estate to *A.* and all my trust estate to *B.*" If that had been the devise, another well-established rule of construction would have applied, namely, that where you find a general gift in the will followed by a particular gift which would from its nature be included in the general gift, you read the particular gift as being an exception from the general gift. A man may begin his will by saying, "I give all my personal estate to *A.*, and I give my gold watch to *B.* and £100 to *C.*" Nothing can be better established than this, that although the words "all my personal estate" would carry both the gold watch and the £100, yet, they being found as particular bequests—one specific and the other general—still, the words "all my personal estate" are to be read as "all my personal estate except what I have hereinafter given to *B.* and to *C.*" The words are read as a gift of residue, and not as a gift of the entirety. If a man says, "I give all my real estate to *A.*, and I give *Blackacre* to *B.*," no one could doubt for a moment that the gift to *A.* must be made consistent with the gift to *B.*, by excepting *Blackacre* from the gift of all the real estate. Therefore, when we have a will which says, "I give all my real estate to *A.*, and I give all my trust estate to *B.*," you except the trust estate on the same principle as you except *Blackacre* from the gift of the real estate; and therefore it must be read as a gift of "all my real estate except the

(1) 1 Jac. & W. 494.

M. R.
1876
LYSAGHT
v.
EDWARDS.
Judgment.

trust estate to *A.*," and a gift "of my trust estate to *B.*;" and in that way you make the whole will consistent. Consequently, if, in *Wall* v. *Bright* (1), we had had a gift of "all my real estate to *A.*," followed by a gift "of my trust estate to *B.*," I can see no doubt that the estate in question (assuming it to be, as I think it was, a trust estate) ought to have been held to pass under the second gift, and not under the first gift. But in *Wall* v. *Bright* there was only a single gift, and therefore the words "all my real estate" could not be cut down by reason of there being a subsequent gift of part of the real estate, and they were therefore to have their primary signification, unless you could find in the trusts something which was repugnant to the idea that the testator was dealing with an estate which he contracted to sell.

I shall now first of all consider the will which was the subject of decision in *Wall* v. *Bright*, and give my reasons for thinking that the decision was correct, and then I am afraid I must consider the reasons given by the learned Judge who gave that decision, and say how far I can follow them. The will in *Wall* v. *Bright* was made after the date of the contract. It does not appear whether or not the title was accepted, but from the time which had elapsed and what had taken place, I think it is most likely that the title was accepted in the testator's lifetime; but it is treated in the judgment as not being accepted at the date of the will. Whether this was so or not does not appear from the report or from the record, which I have sent for. The gift was a gift by the testator of all and every his freehold and all other his real and leasehold messuages or tenements, farms, lands, and hereditaments whatsoever and wheresoever, and whether held for lives, terms of years, or otherwise, and also all his goods and chattels, and personal estates, and effects of every nature and description, to trustees, upon trust, as soon as conveniently might be after his decease, to sell and dispose of all and singular his said freehold and other real and leasehold messuages, &c., and all his personal estate of every description, and to receive the purchase-money and to invest it in certain stocks and funds, which were to be held upon certain trusts. Now why, under such a gift, should not the legal estate pass? If there was a valid contract for sale, either because the

(1) 1 Jac. & W. 494.

title was good, or if bad had been accepted, the testator would have become a constructive trustee for the purchaser, but a constructive trustee with possession (for it appears that the purchaser had not been let into possession of the whole), with a right to retain that possession until the purchase-money was paid, with a lien or charge upon the estate for the purchase-money, and a right to make that lien effectual by a suit in equity if he thought fit. In other words, the testator was possessed of personal estate with a charge upon the real estate to secure the payment of the sum due to him as part of his personal estate. If, on the other hand, the title, being bad and not having been accepted, was in such a state at the time of his death that the purchaser was entitled to refuse the estate, then there was not a valid contract to sell; there was nothing which would have been binding upon the testator's heir, under the doctrine of constructive conversion; and then the testator would have been entitled to the real estate, to the freehold estate free from any contract at all, because the contract he had entered into was not binding.

Those are the two possible views of the position at the time the testator made his will, and at the time of his death. It seems to me that, taking either view to be correct, there is nothing in these trusts inconsistent with the notion that you are to give to the words "my real and personal estate" their full meaning. If he were entitled simply to the real estate as a security for the payment of the purchase-money, there is a trust for the trustees to get in and to sell and dispose of his personal estate, a trust which they can only carry out by having the legal estate to convey to the purchaser. They cannot get in the personal estate given to them, except by having the legal estate, and therefore there is a reason why he should give them the legal estate. Not only so, but under the words of the will they might actually put up for sale and have sold the charge, and upon payment by the purchaser they would have conveyed the legal estate in the property to him in order to secure the lien. There is nothing, therefore, in this view of the case which would lead you to say that the terms of the gift were inconsistent with an estate contracted to be sold by the vendor being intended to pass. On the other hand, if the contract were invalid, of course he had a right to devise it as part of

M. R.
1876
LYSAGHT
v.
EDWARDS.
Judgment.

his real estate upon trust for sale. Therefore, looking at the will as it stands, it does appear to me, taking either alternative, that there was not any repugnancy in the trust, nothing to cut down the proper meaning of the words in a gift of real and personal estate.

While on this branch of the subject I may advert to those numerous decisions on mortgage estates in which it has been held that the legal estate in a mortgage passed by a gift of mortgages or a gift of securities for money to persons who were to take the mortgage money in order to enable them to receive the money which it was part of their duty to receive. Therefore, if the decision had stood alone without more, I could have seen ample ground for holding that in the particular case which the Court had to deal with in *Wall* v. *Bright* (1) there was no difficulty in saying that full effect was to be given to the ordinary meaning of the words. I must say, however, I am not quite entitled to deal with the case in this way. In the first place, I feel bound to observe that the case was not very carefully decided. It appears by the report and by the record (which I have examined), and it was stated in the argument, that one of the fields, one of the two comprised in the second agreement, had been fully paid for. Upon looking at the agreement, which is properly stated in the report, it appears that these two fields were two separate purchases although they were in one contract—they were separately sold for separate sums, and were distinct purchases. Consequently, as regards one of these fields, there had been full payment, and the testator was a mere trustee. That point seems to have escaped notice by the Judge, for I see that the decree is general, and includes the whole of the property.

8 CLD 630

The next observation is, that although Sir *Thomas Plumer* says in one part of his judgment that the vendor is a constructive trustee, yet in other parts he seems to consider he is not quite a trustee. He says (2): "Now, though there is a great analogy in the reasoning, with respect to the will of a naked trustee and that of a constructive trustee, on the ground of the impropriety of their attempting to dispose of the estate, yet for many purposes they stand in different situations. A mere trustee is a person who not only has no beneficial ownership in the property, but never had any, and could, therefore, never have contemplated a disposition of it

(1) Jac. & W. 494. (2) 1 Jac. & W. 501.

as of his own." That is not quite accurate. A man may have once been owner and become trustee; he may settle his own estate for value by declaring himself a trustee, and he may thus become a trustee although he was once the owner; so that it is not quite right to say the question depends upon his being owner once. Then the judgment goes on to say: "In that respect he does not resemble one who has agreed to sell an estate, that up to the time of the contract was his. There is this difference at the outset, that the one never had more than the legal estate, while the other was at one time both the legal and beneficial owner, and may again become the beneficial owner, if anything should happen to prevent the execution of the contract; and in the interim, between the contract and conveyance, it is possible that much may happen to prevent it. Before it is known whether the agreement will be performed, he is not even in the situation of a constructive trustee; he is only a trustee *sub modo*, and provided nothing happens to prevent it, it may turn out that the title is not good, or the purchaser may be unable to pay." Now, as regards the first of these alternatives, the law is correctly laid down. If the title is not good there is no valid agreement, and the whole doctrine assumes that there is a valid contract. But as regards the other, I must say that the law is now settled otherwise, and, as I think and have said before, it was so settled before the time of Lord *Hardwicke*. The fact of the purchaser being able to pay or not able to pay is immaterial; if there is a valid contract, the conversion is effected. All the cases as to conversion turn upon this, whether, at the time of the death, there was a valid contract; and you never go on to inquire whether the purchaser is solvent or insolvent—whether he is able to pay or not able to pay. If the purchaser proves unable to pay, you may get back the estate in equity; but the contract is binding, and makes conversion. Therefore that must be thrown out of consideration. Then the judgment goes on to say: "The agreement is not for all purposes considered to be completed." That is so. "Thus the purchaser is not entitled to possession, unless stipulated for; and if he should take possession it would be a waiver of any objections to the title: the vendor has a right to retain the estate in the meantime, liable to account if the purchase is completed, but not otherwise. Till

M. R. 1876 LYSAGHT v. EDWARDS. Judgment.

then it is uncertain whether he may not again become sole owner: the ownership of the purchaser is inchoate and imperfect; it is in the way to pass, but it has not yet passed." I cannot treat that as law. The ownership has passed the moment the contract is made, if valid. If the learned Judge means to include the case of a bad title which the purchaser refuses, then I say that in that case there is no contract for the purpose we are now considering. Every contract for the sale of real estate is made under an implied condition that the vendor is entitled to sell the estate; if he is so entitled, then by the contract the equitable ownership passes subject to a charge for the purchase-money; but it may be destroyed by proceedings in equity by the owner of the charge. Then he goes on to say: "While a suit for a specific performance is pending, nice questions may arise, and it is settled that the vendor may complete the title while under investigation in the Master's office. The purchaser is not bound till the title is made out, and suppose the will to be made in the interim. Then there is a contract to sell, which the other party has refused to adhere to; the title is doubtful, and it is uncertain whether it can be completed. Is he not then, if making his will in that state of things, to make a disposition of the estate?" That, I think, is the key to the argument. What he means is this: The vendor does not know yet whether he can make a title or not; there is, therefore, at least one alternative in which he may dispose of the estate, namely, in the case of the title not being made out, so that the contract is avoided. Then he goes on to say: "If the Court were to decide that the legal estate did not pass to the trustees, the consequence would be, that the Defendant would be exonerated from his contract, and it will then become necessary either to decide that it did pass, or else to say that it descended beneficially to the heir-at-law." That is not so. The law is correctly stated by Vice-Chancellor *Wood*, in the case I have cited, to the effect that the contract binds the heir-at-law; he does not take beneficially; he is a mere trustee for the next of kin. It is quite true at this time you could not get a conveyance from the heir-at-law if he was under disability, and therefore you could not force the purchaser to complete, because he was entitled to have the legal estate; but although the purchaser got off completing the con-

tract, the heir-at-law did not take beneficially. Nevertheless it seems to me that this idea that the heir-at-law could take beneficially was the moving consideration with Sir *Thomas Plumer* to make the estate pass. Then he goes on to say: "The vendor is, therefore, not a mere trustee, he is in progress towards it, and finally becomes such when the money is paid, and when he is bound to convey. In the meantime he is not bound to convey; there are many uncertain events to happen before it will be known whether he will ever have to convey, and he retains, for certain purposes, his old dominion over the estate. There are these essential distinctions between a mere trustee, and one who is made a trustee constructively, by having entered into a contract to sell; and it would, therefore, be going too far to say that they are alike in all respects; the principle that the agreement is to be considered as performed, which is a fiction of equity, must not be pursued to all its practical consequences. It is sufficient to say that it governs the equitable estate, without affecting the legal. Then, under all these circumstances of dissimilitude, are we to extend the principle that has been established as to mere trustees, to one who is partly the owner, who has the legal, and partly the beneficial estate? . . . ." "This case, I think, is very different from those, and does not fall within the principle which they afford. The will of a trustee, giving the trust estate for his own purposes, never can be right, that of this testator might. In this case, if the contract fails, there is a beneficial ownership, that is left undisposed of if the will is not to have effect. If the contract is performed, no injury arises from this construction; the only effect is that the trustees convey instead of the heir; but if it be not performed, a positive injustice is done by the other, for the estate goes to the heir, contrary to the intent of the testator. The safest way is to hold that the estate passes, adhering to the words, there not being enough to take it out of them." So that he really ends by saying that it is an example of the doctrine that the words would pass all the real estate, as they undoubtedly would, and there is not enough in the trust to lead to a contrary conclusion. He then says: "The present is a strong instance of the propriety of this construction, for the testator has in substance done no more than would have been proper if he had contemplated the consequences. He

M. R. 1876 LYSAGHT v. EDWARDS. Judgment.

intended that all his real estate should be converted into money; then if the contract is completed, it supersedes the necessity of another sale; if not, the trustees are to sell. To give to the trustees the legal estate, is not inconsistent with this intention, on the contrary, it is just what he ought to have done to enable them to convey to the purchaser. They are to dispose of the legal estate in the manner directed by the will, except that it differs by being in pursuance of a prior instead of a future sale." There the judgment ends.

I think it is impossible to give effect to all those reasons, and that some of them must be considered as not quite accurate in law. It is quite possible to support the decision on the grounds I have stated, and it is quite possible to support it even on less special grounds. It may well be that where there is no devise of trust estate, but a mere devise of real estate upon trust to sell, with a gift of the personal estate to the same persons to get in, you ought to hold that the real estate passes, because, *quacunque viâ*, those persons would get the purchase-money, and therefore they ought to have the means of obtaining it. There is still another ground, as to which I must now refrain from giving an opinion, but upon which it is also possible to support the decision. It might be said that where there is a devise of "my real estate" upon trust to sell and take the purchase-money, and the proceeds of sale and the personal estate are beneficially given to the same persons, that in such a case it is given for the purpose of completing the sale already made. You cannot so treat it where the real and personal estate are not given to the same persons beneficially, because the estate contracted to be sold has been converted into personalty by the contract, and would go in a different way from the real estate directed by the will to be sold. A striking example of this is the case of *Lawes* v. *Bennett* (1). There an option of purchase reserved by a lease was exercised after the death of the lessor, and it was held that the option took effect from the date of the lease, so that the property had been converted in his lifetime from real estate into personal estate; and that the persons who took the personal estate under the lessor's will had become entitled to the purchase money, and not the devisee of the real estate.

(1) 1 Cox, 167.

M. R.
1876
LYSAGHT
v.
EDWARDS.
Judgment.

I think I ought also to refer to the case of *Whittaker* v. *Whittaker* (1) as to the effect of the annulment of the contract for sale by reason of the incapacity of the purchaser to pay. In that case it was held that the cancelling of the contract by the decree of the Court of Equity after the death of the purchaser, by reason of his executors not then having funds available to complete the contract, did not affect the rights of the persons who took beneficially under the will of the purchaser; in other words, that it did not reconvert the estate, but effected a cancellation of the contract from the date of the decree, and was not a rescission of the contract *ab initio*, which of course would prevent conversion.

I now come again to the will before me. First of all, there is a charge of "such part of my real estate as consists of my messuage, farm, and lands at *Arlsey* aforesaid, called the *Bury Farm*, in exoneration of my personal estate with the payment of my debts, and of the pecuniary legacies aforesaid;" and, subject to the trust hereinafter contained for sale of the same hereditaments, he directs the debts and legacies to be received under the statutory power; and then there is a general devise of all the real estate.

The first question is, Is there a specific devise of *Bury Farm?* It is a question of some difficulty, but I think there is not. He had sold *Bury Farm*, he had not got *Bury Farm* at the date of his death; if he had not *Bury Farm* at the time of his death, beyond all question he could not charge it. The object of referring to *Bury Farm* is to charge it. It is stated to be part of his real estate, and it was at the date of his will really part of his real estate. When he says, "subject to the trust hereinafter contained," he means subject to the trust affecting my real estate, so far that real estate includes *Bury Farm*, but if *Bury Farm* is dropped out of the charge of debts (as it was, because the will is to take effect from the time of his death), why am I to say that that which was a mere clause to shew that the general gift of his real estate was not to be done away with by the specific charge of *Bury Farm*—that is, that *Bury Farm* was still to be subject, as all his other real estate, to the trusts of his will—why am I to hold that such a clause is to prevent it dropping out of a gift of "my real estate"? I think the will must be read and interpreted

(1) 4 Bro. C. C. 31.

M. R. 1876 LYSAGHT v. EDWARDS. Judgment.

by the *Wills Act*, and that the gift of "my real estate" is a gift of "the real estate which I shall be entitled to at the time of my death." Then we have that followed by a devise to Mr. *Hubbard* of "all real estate which at my death may be vested in me as trustee." Therefore this testator actually contemplated that something might happen between the date of his will and his death, and even without the *Wills Act* you might well have read it as providing that "if by any reason that which is vested in me as absolute owner of my real estate shall become vested in me as a trustee, that shall go to somebody else." That is perfectly consistent, and consequently if this estate was vested in him (as I hold it was) as trustee at the time of his death, it appears to me that it must pass to *Hubbard* as sole devisee.

Therefore, in my opinion, there is a good title, and the concurrence of the heir-at-law or customary heir is not necessary to give a complete title to and a conveyance of the estate comprised in the contract with the Plaintiffs.

Solicitors: *Whites, Renard, & Co.*, agents for *Henry Brittan, Press, & Inskip, Bristol; Freshfields & Williams.*

M. R. 1876 *April* 1, 29.

In re VENOUR'S SETTLED ESTATES. VENOUR *v.* SELLON.

[1874 V. 9.]

Settled Estate—Building Land—Construction of Roads and Sewers—Money to be invested in Land—Leases and Sales of Settled Estates Act, 1856 (19 & 20 *Vict. c.* 120), *ss.* 14, 23—*Act of Parliament—Marginal Notes.*

11 Ch D. 465.

The Court has no power, under the Leases and Sales of Settled Estates Acts, to charge, mortgage, or sell part of a settled estate in order to raise money for making roads and sewers on building land forming other part of the estate; nor has it power to apply for that purpose money which is liable to be laid out in the purchase of lands to be settled to the same uses as the settled estate.

Semble, the marginal notes to an Act of Parliament now form part of the Act, and may be used for the purpose of interpreting it.

Statement.

UNDER a settlement dated the 30th of June, 1852, and made on the marriage of Mr. and Mrs. *Venour*, certain real estate stood

limited to the use of Mrs. *Venour* (who had survived her husband) during her life, with remainder as to one moiety thereof to such uses as she should by deed or will appoint, and as to the other moiety and also (in default of appointment) the first mentioned moiety to the use of the children of the marriage, as tenants in common, in equal shares, with cross limitations between them in the event of any child dying under twenty-one without leaving issue. The settlement contained a power of granting building leases for a term not exceeding seventy-five years.

Under the same settlement a sum of £4730 13*s.* 8*d.* consols was held upon trusts corresponding with the limitations of the real estate, and there was power to invest this fund in the purchase of land.

There were five children of the marriage, of whom one, *John Hamilton Venour*, had attained twenty-one; two were still living, but were infants, and the remaining two had died under twenty-one without leaving issue.

The suit of *Venour* v. *Sellon* was instituted for the administration of the trusts of the settlement; and a decree had been made therein.

Part of the settled real estate consisted of a piece of land at *Mile End*, containing 2A. 2R. 4P., which was entirely vacant and unoccupied, but was well adapted for building purposes. In order, however, that it might be built upon to the greatest advantage, it was necessary that a considerable sum should be expended in constructing roads and drains, and that there should be power to grant leases for ninety-nine years, and to enter into preliminary contracts for granting such leases.

Mrs. *Venour* and Mr. *John Hamilton Venour* now presented a petition in the suit, and under the Leases and Sales of Settled Estates Acts, asking that roads and drains might be constructed on the piece of land in question; that so much of the consols, subject to the trusts of the settlement, as might be necessary for defraying the expense (not exceeding £1500 in the whole) of constructing the roads and drains, might be sold and applied in defraying such expense; and that powers of granting building leases for ninety-nine years, and of entering into preliminary contracts, might be vested in the trustees of the settlement.

M. R.

1876

In re VENOUR'S SETTLED ESTATES.

VENOUR v. SELLON.

Argument.

Roxburgh, Q.C., and *Badnall*, for the petition :—

First: This is really an investment in land within the meaning of the power contained in the settlement, and of sect. 23 of the *Leases and Sales of Settled Estates Act*, 1856. It has been held in cases under the Lands Clauses Consolidation Acts and other statutes that the erection of a house is substantially the same thing as the purchase of a new estate. In order to make the best bargain, it is here necessary to incur a preliminary expenditure in making roads and drains, and this expenditure may, upon the principle of the cases referred to, come out of the settled fund.

[JESSEL, M.R., referred to *Drake* v. *Trefusis* (1).]

Secondly: Under sect. 14 of the *Leases and Sales of Settled Estates Act*, 1856, the Court has power to direct that any part of any settled estate be laid out for streets and sewers, drains and watercourses. Such a power would be nugatory, if there were no means of defraying the necessary expense of constructing the roads and sewers; and consequently the Court must have power to direct the funds for the purpose to be raised by a charge on the estate or by mortgage. We ask, therefore, that part of the trust fund may under this power be directed to be lent on mortgage of the settled estate, as was done in the unreported case of *Re Gilbert* (2).

Thirdly: If the object cannot be attained in any other way, we ask that part of the trust fund may be sold and lent on the security of a mortgage of the Petitioners' interests in the property.

Morton R. Phillips, for the trustees of the settlement and the infant children.

Judgment.

JESSEL, M.R. :—

This petition raises a question of importance, viz., whether under sect. 14 of the *Leases and Sales of Settled Estates Act*, 1856, the Court has power to charge, mortgage, or sell part of a settled estate in order to raise money for the purpose of constructing roads, sewers, &c., in a case where it is manifestly for the benefit of all parties interested that this should be done.

(1) Law Rep. 10 Ch. 364. (2) See 2 H. & M. 203.

M. R.
1876
In re VENOUR'S SETTLED ESTATES.
VENOUR *v.* SELLON.
Judgment.

The argument is, that, there being power in the Court "to direct that any part of any settled estates be laid out for streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or watercourses, either to be dedicated to the public or not," and it being obvious, from the nature of the improvements mentioned, that they could not be effected without the expenditure of money in the first instance, and that they could not of themselves bring in money, there must be power in the Court to raise money for the purpose.

But, in the first place, the 14th section does not say that the Court may direct roads and sewers to be made, but that the Court may direct any part of the estate "to be laid out" for roads and sewers. Those words do not mean that the Court may order the roads and sewers to be made, but merely that the building plans sanctioned by the Court may include the construction of roads and sewers; if it had been intended that the Court should have power to order them to be made, I think that expression could not have been made use of. This view is borne out by the marginal note; and I may mention that the marginal notes of Acts of Parliament now appear on the Rolls of Parliament, and consequently form part of the Acts; and in fact are so clearly so, that I have known them to be the subject of motion and amendment in Parliament. The marginal note to the 14th section is, "Court may authorize dedication of parts of settled estates for roads, &c."; and consequently it appears that this note explains the Act in the way I have done. Further, the 15th section begins: "On any sale or dedication to be effected as hereinbefore mentioned": the word sale refers to sect. 11, and the word "dedication" to sect. 14; and I have no doubt that the draftsman of the Act meant by sect. 14 exactly what is said in the marginal note to that section.

If, however, I had thought otherwise, I should have considered myself bound by two decisions on the section: *In re Chambers* (1), and *Re Hurles' Settled Estates* (2). These are clear and distinct authorities that the Court will not authorize the sale of a portion of the estate for raising money to make roads on building land, or authorize sale moneys to be so laid out. It is true that the learned Judges who decided those cases did not consider the argument which has been addressed to me to day; but that argu-

(1) 28 Beav. 653. (2) 2 H. & M. 196.

M. R.
1876
In re VENOUR'S SETTLED ESTATES.
VENOUR v. SELLON.
Judgment.

ment, if it is worth anything, must go to this extent, that the Court has the power which it was expressly decided in those cases not to have.

Then it appears from the last of these cases (1), that in an unreported case of *Re Gilbert*, Vice-Chancellor *Stuart* directed money which happened to be in Court, subject to be laid out to the same uses as the building land, to be applied in making roads; but after the decisions in *Drake* v. *Trefusis* (2) and *In re Newman's Settled Estates* (3), I think the circumstance of there being money in Court cannot influence the decision. Those cases decide that as regards money in Court under the *Settled Estates Act* and other Acts, the Court will not allow it to be laid out otherwise than in the purchase of land except in one case, viz., the building of a house; and it is difficult to see how that exception arose. If it were a matter of principle, you ought to be able to apply the money in building part of a house; but if the decisions are anomalous, and have arisen by what has been called legislation on the part of the Judges, then succeeding Judges finding that course of decisions are bound by it; but they must not carry it any further. It appears to me that the two cases to which I have referred shew that the decisions as to laying out money in building are of this anomalous character.

In the case of *In re Newman's Settled Estates* (4), the application was to apply a considerable sum in building a new house, and a small sum of £15 7*s.* 8*d.* in drainage. A number of cases were cited, and the application was allowed. Lord Justice *James* said: "The cases proceed on the principle that the erection of a building is substantially the same thing as the purchase of a new estate." Lord Justice *Mellish* said: "I think the authorities are too strong to be departed from. It would be mischievous to overrule such a course of decisions, though I am not prepared to say that in the absence of authority I should have decided the point in the same way." If nothing more had taken place I might have been embarrassed by the circumstance that the application was allowed in respect of drainage: but in *Drake* v. *Trefusis* (5), the Court was asked to lay out money in both ways, that is, both in erecting new buildings

(1) 2 H. & M. 203.
(2) Law Rep. 10 Ch. 364.
(3) Law Rep. 9 Ch. 681.
(4) Ibid. 681, 683.
(5) Law Rep. 10 Ch. 364, 366.

and in repairs and permanent improvements of old buildings; and the case as regards the latter was very strong, because there had been a fire which destroyed a large part of the mansion-house on the estate, and it was proposed to apply the fund in reinstating it. But Lord Justice *James* said: "We never intended to go further than this, that the expending money in building a house on a vacant piece of ground forming part of the settled property is in substance the same thing as buying a house; and that money to be invested in the purchase of real estate may therefore be properly applied in the erection of new buildings. Repairs and permanent improvements do not come within this principle. I am therefore of opinion that the proposed expenditure in reinstating the mansion cannot be sanctioned, nor any outlay in permanent improvements which do not put new buildings on the ground." That decides, therefore, that the only exception to laying out the money in the purchase of real estate is putting a new building on the ground; and it also decides that the rule applies where the money is held under the trusts of a will or settlement just as much so as when it arises under an Act of Parliament. I am therefore unable to follow the decision of Vice-Chancellor *Stuart* in *Re Gilbert.*

I am disposed, however, to help the Petitioners if I can; and I will allow the money to be advanced to them on mortgage if they can satisfy the Chief Clerk that the proposed security is sufficient. The petition may stand over in order that a summons may be taken out for the purpose.

April 29. The petition came on again along with a summons asking that a portion of the consols might be sold, and the proceeds advanced on the security of a mortgage by the Petitioners of their interests in the real estate subject to the settlement; and the Chief Clerk having reported in favour of the security, an order was made sanctioning the loan, and the laying out of part of the property in roads and sewers, and the granting of building leases.

Solicitor: *E. R. Phillips.*

M. R.

1876

May 5.

ABUD *v.* RICHES.

[1876 A. 1.]

Practice—Attachment—Costs—Discretion of Court—Rules of Court, 1875, *Order* XLIV., *r.* 2; *Order* LV., *r.* 1.

The costs of an attachment are no longer fixed, but by Order LV., rule 1, they are in the discretion of the Court, and should be disposed of at the time of the application for the writ under Order XLIV., rule 2.

Statement.

THIS was a motion on the part of the Plaintiffs in the action, that the Defendant, *Jonathan Henry Riches*, might be ordered to deposit certain documents in Court, and to pay the taxed costs of an executed writ of attachment.

The writ had been issued on the application of the Plaintiffs, on the 6th of April, 1876, for disobedience to a prior order requiring the Defendant to file an affidavit of documents. The order for the attachment contained no direction as to costs. On the 28th of April the Defendant cleared his contempt, and obtained an order of discharge on tender of 13*s.* 8*d.*

The question was whether the Defendant could now be ordered to pay the taxed costs of the attachment.

Argument.

Waller, Q.C., and *Sladen*, in support of the motion.

T. A. Roberts, for the Defendant:—

The costs of an executed attachment are 13*s.* 8*d.* only: *Brown* v. *Lee* (1); *Daniell's* Chancery Practice (2). There is not a word in the new practice to alter this rule; and it is expressly provided by the note prefacing the Rules of Court, 1875, that, where no other provision is made by the Act or those Rules, the old practice remains in force. Besides, the Plaintiffs come too late. They should have applied for costs at the time when they obtained leave to issue the writ.

Judgment.

JESSEL, M.R.:—

I do not feel any difficulty in deciding this case. It has rather

(1) 11 Beav. 379. (2) 5th Ed. p. 431, n.

an important bearing upon what the practice shall be in future. The Judicature Acts have altered the practice as regards attachments in a very important particular. Formerly, when a contempt of the Court of Chancery was committed, an attachment was often issued as an order of course at the applicant's wish; and if he who got the attachment was wrong, he took the consequences. The intention of the present rule, following the analogy of the Act for abolition of imprisonment for debt (32 & 33 Vict. c. 62), was that the suitor shall not have the power of imprisoning anybody, but the Court only. Accordingly this rule was put into Order XLIV.: "No writ of attachment shall be issued without the leave of the Court or a Judge, to be applied for on notice to the party against whom the attachment is to be issued." That, once for all, deprives the suitor of the right he formerly had of imprisoning his opponent, if he chose to do it, at his own risk. The suitor acting thus might be a pauper, and unable to pay the costs, or might do it maliciously. It is now an order of Court, to be made upon notice, and therefore in many cases after discussion. That is the new position of matters.

With regard to the costs, there is the provision in rule 1 of Order LV., that, subject to the provisions of the Act—which do not bear upon this matter—the costs of or incident to all proceedings in the High Court shall be in the discretion of the Court. Upon any application made to a Judge of the High Court as to costs, it is discretionary with him to grant costs or not to the fullest extreme. The note to which I was referred at the head of the first schedule of rules is, no doubt, a very proper note to put practitioners on their guard.

Therefore, as regards the writ of attachment, there are two provisions expressed. One is, that it is not to be issued without notice, and the other is as to the costs. Both are to be in the discretion of the Court. There are no longer any fixed costs, as a matter of course, which cannot be altered in the discretion of the Court. In the present case, the Defendant was attached by order of the Court for contempt. He alleged he had cleared his contempt, and he went and obtained an order of course at the Rolls, discharging him upon payment of 13*s.* 8*d.*, which was the old sum payable when the writ had been executed. Thereupon

M. R.
1876
ABUD
v.
RICHES.
Judgment.

he was discharged, and the Plaintiff now moves, amongst other matters, that the Defendant shall be ordered to pay the costs of the attachment.

I think it right to mention the other matters, as the Plaintiff was obliged to come here to obtain the order for the deposit of deeds, and therefore no additional costs have been occasioned by his asking also for the costs of the attachment. It is said that these costs ought to have been asked for upon the application for the attachment. To that I assent. It should be understood in future that parties who move for a writ of attachment should ask for the costs at the same time. Then it is all before the Judge, and he will decide whether the Respondent is to pay the costs or not, the costs being now discretionary. Therefore, if this application had been rendered necessary by the Plaintiff's neglect to ask for costs at the time, and thereby further expense had been incurred, I should have made him pay the costs of it. But it is immaterial in the present instance, as no further expense has been occasioned.

The old rule as to attachments was fixed by the practice of the Court, that in cases like default in putting in an answer, and so on, upon payment of 13*s.* 8*d.* costs the man was discharged; but where the costs were discretionary he was only discharged upon payment of the taxed costs, according to the form of order in *Seton* (1). If this order had been made in the proper form, "that the Defendant do pay the costs," he could only have got his order at the Rolls in that form, and he would have had to pay the taxed costs. Through the Plaintiff not putting these words in the order this has not been done; but this circumstance does not exempt the Defendant from being ordered now, in the discretion of the Court, to pay the taxed costs. They have not been waived or given up. No doubt they have been asked for at last by a separate application, which ought not to have been necessary; but still I have authority to order him to pay them. As I should have ordered him to pay them before, I shall, under the circumstances, order him to pay them now.

Solicitors: *C. G. Scott; Randall.*

(1) Vol. ii. p. 1237.

In re PERCY & KELLY NICKEL, COBALT, AND CHROME IRON MINING COMPANY.

M. R. 1876 April 29; May 6.

Company—Winding-up Petition—Opposition by Foreign Shareholders—Security for Costs.

A shareholder of a company who resides out of the jurisdiction and appears to oppose a petition for winding up the company cannot be required to give security for costs.

Statement.

THIS was a creditors' petition for winding up the *Percy & Kelly Nickel, Cobalt, and Chrome Iron Mining Company, Limited.* The petition was opposed by certain shareholders of the company residing in *Paris*, who filed affidavits in opposition to the application, and also applied to have the Petitioner cross-examined.

The petition was opened on the 29th of April, and the cross-examination of the Petitioner was commenced, when the further hearing was adjourned for a week in order that the books of the company might be produced. Upon the petition again coming on,

Argument.

Ince, Q.C. (*Terrell* with him), for the Petitioner, asked that the opposing shareholders might give security for costs, urging that they might put the Petitioner to great expense, which he would be unable to recover from them or from the company, which was insolvent. He referred to the Rules of Court, February, 1876, rule 7.

Roxburgh, Q.C. (*Grosvenor Woods* with him), for the shareholders, objected that the application was too late.

Chitty, Q.C., *Phear*, and *Palmer*, for other Respondents.

Judgment.

JESSEL, M.R.:—

This application is entirely unfounded.

The principle is well established that a person instituting legal proceedings in this country, and being abroad, so that no adverse order could be effectually made against him if unsuccessful, is by the rules of the Court compelled to give security for costs. That is a perfectly well-established and a perfectly reasonable prin-

M. R. 1876 *In re* PERCY & KELLY NICKEL, COBALT, AND CHROME IRON MINING CO. Judgment.

ciple; but it does not apply to a Defendant or Respondent who is brought here to defend himself. If the person who institutes proceedings chooses to bring here people out of the jurisdiction, he must, in the first instance, consider whether or not it is worth his while to do so, even if he does not get costs. He must take upon himself the risk of being unable to recover his costs, and cannot be allowed to say that the Defendant whom he has chosen to bring here is not to defend himself.

Nor does it make any difference if, as is the case here, the party who appears is not named as a Respondent or served. The Petitioner who presents a petition of this kind knows that by the Act of Parliament any shareholder may appear to oppose it; he knows that there may be shareholders out of the jurisdiction, and, as I said before, he must take all that into account before he presents his petition.

It is said that the Respondent may put the Petitioner to great expense, and not be able to pay; but that is a remark which applies to every Defendant or Respondent named as well as unnamed.

No authority is produced in favour of this application: indeed I feel sure no one ever heard of such an application before. But such authority as there is is quite the other way. I have before me the case of *Cochrane* v. *Fearon* (1), in which a Defendant out of the jurisdiction presented a petition, and security for costs was asked for and was refused. That case was decided by Vice-Chancellor *Kindersley*, and shews that a Defendant who is brought before the Court has a right to take any proceeding to defend himself without being called on to give security for costs.

That is my view of the law; but even if it had been different, I should have been compelled to say that the application is too late. The cross-examination of the Petitioner was commenced a week ago, and the litigation having been allowed to proceed, the Petitioner cannot now compel the Respondents to give security.

Solicitors: *T. K. Edwards & Son; G. S. & H. Brandon; Wyatt & Barraud; Barnard & Co.*

(1) 18 Jur. 568.

CROSSLEY *v.* TOMEY.

V.-C. M.

1876

Feb. 28.

[1875 C. 247.]

Exceptions to Answer—Infringement of Patent—Insufficiency—Particulars of prior User.

In a suit to restrain the infringement of a patent the Defendant was required to state whether he was not making articles in all respects identical with those of the Plaintiff, and to set forth in what respects they differed and by what process they were made:—

Held, that the Defendant, who alleged prior user by himself and others, had sufficiently answered by stating that, save so far as the articles manufactured by him before the date of the patent were similar to those of the Plaintiff, the articles he now made differed from those made by the Plaintiff, but he could not shew in what they differed without ocular demonstration:

Held, also, that the Defendant was bound, in alleging prior user by other persons, to set forth the names of some of those persons.

Statement.

THIS bill was filed on the 30th of July, 1875, for an injunction to restrain the infringement of a patent granted to the Plaintiffs for improvements in water-gauges. The patent was dated the 1st of December, 1874, and the specification, which was filed on the 29th of May, 1875, described the invention as relating to improvements in that class of water-gauge in which the level of the water is seen through a glass tube, or in a chamber having a glass front. The object of the invention was to overcome the difficulty experienced in seeing the water in the glass tube, by means of the application of white or coloured enamel or other reflecting means to the back of the tube or chamber. This was effected by painting or otherwise covering the outside of the tube to the required width with enamel glass powder and fusing the same thereon by the application of heat, or by embedding a layer of enamel glass of the required width in the body of the glass forming the tube. By this means the light is powerfully reflected through the water, whereby the level thereof is rendered more readily visible.

The Plaintiffs alleged that in July, 1875, they first discovered that the Defendant, who was a glassblower at *Aston*, near *Birmingham*, was making and vending water-gauges in all material respects identical with the water-gauges so patented by the Plaintiffs.

V.-C. M. 1876

CROSSLEY v. TOMEY.

Statement.

The case now came on upon exceptions to the answer.

The 6th interrogatory was in the following words:—

"Is it not the fact that in the month of July, 1875, or at some other and what time the Plaintiffs, and whether or not for the first time or in fact discovered, and whether or not as the fact was that the Defendant, and whether or not who is a glass-blower, and whether or not residing at *Aston* near *Birmingham*, or at some other and what place, was, and whether or not without any license or permission from the Plaintiffs or either of them, making, and whether or not vending, water-gauges, and whether or not in all material respects identical with the water-gauges so patented by the Plaintiffs as in Plaintiffs' bill mentioned? Let the Defendant set forth in what particulars the water-gauges made and whether or not sold by the Defendant differ from the water-gauges described in Plaintiffs' said specification, and when first and under what title and by what method or process the Defendant manufactured and whether or not still or when last manufactured the same."

The 11th interrogatory was in the following words:—

"Is it not the fact that, except in respect of the wrongful acts of the Defendant in the Plaintiffs' bill complained of, the said invention has never so far as the Plaintiffs know or believe or in fact been used or practised by any person or persons other than the Plaintiffs, or how does the Defendant make out the contrary, and let the Defendant set forth the names and addresses of the persons by whom, and the dates when, and the places where the Plaintiffs' said invention has been used or practised?"

The Defendant denied the validity of the patent, and in answer to the 6th interrogatory he said: "For upwards of fifteen years prior to the date of the letters patent granted to the Plaintiffs glass tubes enamelled and treated in a manner precisely similar to the tubes intended to be used as water-gauges have been used by myself and by the Plaintiffs and other glass tube manufacturers in the manufacture of barometers and thermometers. Early in the year 1873 I myself, with the view of rendering the height of the column of water in a water-gauge readily visible, applied to several water-gauges which I made the same mode of

treatment in all substantial and material respects as that described or suggested in the specification of the Plaintiffs' alleged invention;" and he further said: "I make and sell divers kinds of water-gauges which, save so far as the method or process adopted by me in 1873 as hereinbefore mentioned is similar to that described or suggested in Plaintiffs' specification of their alleged invention, differ from the water-guages described in Plaintiffs' said specification, but it is impossible, without ocular demonstration, to shew in what particulars the water-gauges made and sold by me differ from the water-gauges described in Plaintiffs' specification, and save as herein appears it is not necessary, as I submit, for me to shew when first or under what title or by what method or process I manufactured and still manufacture or last manufactured the same in all material respects identical with the water-gauges alleged to be patented by the Plaintiffs."

The answer to the 11th interrogatory was as follows:—"I do not know and cannot say of my belief or otherwise whether or not it is the fact that except in respect of my acts in the Plaintiffs' bill complained of (which acts, however, I altogether deny to be or have been wrongful) the said alleged invention has never so far as the Plaintiffs know or believe been used or practised by any other person or persons, and I submit the Plaintiffs are not entitled to require at this stage of the suit the names and addresses of any persons by whom and the dates when and the places where the Plaintiffs' said alleged invention has been used or practised by any other person or persons other than the Plaintiffs. Such user by other persons, so far as the same was prior to the date of the said letters patent, will at the proper stage of the suit form part of my defence to the Plaintiffs' bill, and it is, I submit, immaterial to any relief which the Plaintiffs might be entitled to against me, assuming they establish the validity of their patent, whether or not any person or persons other than myself have or has in fact used or practised the said invention since the date of the letters patent."

Higgins, Q.C., and *Millar*, for the Plaintiffs, in support of the exceptions:—

Our 6th interrogatory requires the Defendant to state whether

V.-C. M. 1876 CROSSLEY v. TOMEY. Argument.

he is manufacturing and selling water-gauges in all material respects identical with those patented by the Plaintiffs, and we require him to state in what particulars the water-gauges sold by him differ from those described in the Plaintiffs' specification, and by what process he manufactures them. This interrogatory is not answered, for the Defendant does not state distinctly in his answer whether he is now making water-gauges similar to ours, and he does not state in what particulars they differ from the water-gauges described in the Plaintiff's specification. He carefully avoids the answer which he is bound to give us. He does not give us the discovery as to the facts stated in the interrogatory. We are entitled to know on the earliest occasion whether the Defendant is making the same articles as those made by the Plaintiff. We are entitled to this distinct answer: "If your patent is a good patent, I deny that I have infringed it." The exceptions are based upon the 41st section of the Act 15 & 16 Vict. c. 83, which says that the Defendant must deliver particulars of any objection on which he means to rely at the trial in support of his defence. The policy of the Act is that the Plaintiff should know on the first occasion on what the Defendant relies, in order that if he thinks fit he may dismiss his bill, and not continue a useless litigation.

The next exception is covered by the decision in *Finnegan* v. *James* (1). We ask whether it is not the fact that our invention has never, so far as the Plaintiffs know, been used or practised by any other persons, and we require the Defendant to set forth the names and addresses of the persons by whom the Plaintiff's invention has been used. The answer to this is a refusal to tell us the names, although he has said previously that our invention has been used by many other glass tube makers. The Master of the Rolls, in *Finnegan* v. *James* (1), decided that a Defendant is bound to set forth in his answer the particulars of any prior user, and the particulars there required were the names and addresses of the persons by whom the Plaintiff's invention had been used.

Glasse, Q.C., and *Fooks*, jun., for the Defendant:—

The Act of 15 & 16 Vict. c. 83, gives no such right as that which is claimed by the Plaintiff. The Defendant may, if he thinks fit,

(1) Law Rep. 19 Eq. 72.

give the information required, and the penalty for not doing so is that he is not allowed to give any evidence which is not contained in the particulars delivered: *Higginson* v. *Blockley* (1); *Bovill* v. *Goodier* (2). The Defendant says that similar articles to those patented by the Plaintiff have been used for many years, but he cannot state the particulars of the difference, if any, without ocular demonstration. We submit that that is a sufficient answer.

As to the 2nd interrogatory, we submit that it is sufficient for the Defendant to answer, as he has done, that other persons have made similar articles, but it is impossible for him to search out the names and addresses of those persons. This is not the stage of the suit in which such information need be given. It is sufficient for the Plaintiff to know that there may be other persons brought forward at the hearing to give evidence of this fact. The case of *Bovill* v. *Smith* (3) decides that a Plaintiff is not entitled to discovery from the Defendant in answer to a general interrogatory as to the instances of prior user, and the Master of the Rolls, in *Finnegan* v. *James* (4), said he would not tie the Defendant so strictly as to give every instance of prior user. The Defendant would be placed at a disadvantage if he were not allowed to give evidence at the hearing of other instances than those he might at the first moment be able to discover.

Higgins, in reply:—

In *Higginson* v. *Blockley* there was one question among several which was not answered, but here it is impossible to say that any part of the interrogatory is distinctly answered. The intention has evidently been to answer evasively, so that at the hearing the Defendant may say his articles are different from ours, or he may say they are the same, according as he finds it most convenient. He does not say he sold these things, but only made them. At the hearing he may say that he has always made the same articles, and he wants at the same time to be able to say that although similar in some respects they are different in others. We are entitled to a distinct answer to each question, in order that we may know what the defence is, and that, if we find there is a

(1) 4 W. R. 60. (3) Law Rep. 2 Eq. 459.
(2) Law Rep. 1 Eq. 35. (4) Ibid. 19 Eq. 72.

V.-C. M. 1876

CROSSLEY v. TOMEY.

Judgment.

substantial answer to our bill, we may avoid further litigation by dismissing it.

MALINS, V.C.:—

This bill was filed in July, 1875, to restrain the infringement of a patent, which was granted on the 1st of December, 1874, the specification being filed in May, 1875.

I agree with what the Master of the Rolls said in *Finnegan* v. *James* (1) that the practice at law and in equity ought to be assimilated as closely as circumstances would admit. The 41st section of the Act 15 & 16 Vict. c. 83, requires the Plaintiff at law to deliver with his declaration particulars of the breaches complained of, and the Defendant is required to deliver with his pleas particulars of the objections relied on. The defence set up to this bill is, that the alleged invention is not a novelty. It is, in fact, this, that for upwards of fifteen years prior to the date of the patent, glass tubes enamelled and treated in a manner precisely similar to the tubes intended to be used as water-gauges, as in the specification mentioned, had been used both by the Defendant himself, by the Plaintiff, and other glass tube manufacturers in the manufacture of barometers and thermometers.

Now, if the Defendant is right in that, it is only applying water to the tubes instead of spirit, or quicksilver, or other materials used for barometers and thermometers. Then he goes on to say, "Early in the year 1873, I myself, with the view of rendering the height of the column of water in a water-gauge readily visible, applied to several water-gauges which I made the same mode of treatment in all substantial and material respects as that described or suggested in the specification of the Plaintiffs' alleged invention."

The Plaintiffs contend that the first interrogatory is not sufficiently answered, and the case of *Higginson* v. *Blockley* (2) has been referred to, in which five questions were asked in one interrogatory, and only four were answered, but here the complaint is that the answer is so mixed up that no part of the interrogatory is distinctly answered. That is a purely technical objection, but I cannot help thinking that the first interrogatory is sufficiently

(1) Law Rep. 19 Eq. 72. (2) 4 W. R. 60.

answered. The answer is, "I cannot shew in what manner the two articles differ without ocular demonstration." In other words, he says, "I cannot answer more particularly than I have done," and that is a good answer. Therefore, I think, as the Defendant has set up that defence, the Plaintiff has got all the discovery he is entitled to, because he can apply for production on these grounds, and that can be followed by inspection.

The second exception proceeds on different grounds, it is this:— [His Lordship read the second objection and the answer to it.] In order to shew that that is sufficient Mr. *Glasse* appealed to the decision in *Bovill* v. *Smith* (1), but it seems that in that case the Act of 15 & 16 Vict. c. 89, was not particularly referred to, though it was referred to in *Finnegan* v. *James* (2). There it was argued that the Defendants would be placed at great disadvantage if they were required to furnish the particulars asked for at that stage of the suit, for they would not be able to adduce at the hearing any other instances of prior user, and the Master of the Rolls thereupon said (3), "I should not tie the Defendants so strictly as that; but if they set up any other instances of prior user, I should expect them to shew that they discovered them after the answer was put in, and also that they gave proper notice to the Plaintiff of their intention to use them at the hearing." That observation shews that his view was that if they set up prior user they were bound to set out the names of some two or three, at least, of the persons who had used them. Therefore, I think the fair result of the decision of the Master of the Rolls is, that the names of persons who are alleged to have used the similar articles should be set out. That course would have the effect intended by the Act, which is, that the Plaintiff may as early as possible know what defence he has to meet, and may be able to find out whether in fact his alleged invention was known before he took out his patent, and may inquire of *A.*, *B.*, and *C.*, who are named as having used the alleged invention, and ascertain whether the defence is made out or not, and this would have the effect of abridging litigation.

On these grounds I consider that I am bound to follow the decision in *Finnegan* v. *James*, and to hold that the second excep-

(1) Law Rep. 2 Eq. 459. (2) Law Rep. 19 Eq. 72.
(3) Law Rep. 19 Eq. 73.

V.-C. M. 1876 CROSSLEY v. TOMEY.

tion must be allowed. I prefer doing this because I am deciding upon the substance of the objection. The Defendant must set out the names of some of the persons who are alleged by him to have used the invention prior to the date of the patent.

The first exception will consequently be overruled, and the second allowed. The Defendant may have three weeks to put in his answer.

Solicitor for Plaintiffs: *Horace Philbrick.*
Solicitors for Defendant: *Emmet & Son.*

V.-C. M. 1876 *March* 15.

MORRIS *v.* DEBENHAM.

[1875 M. 22.]

Vendor and Purchaser—Specific Performance—Joint Sale by Trustee and absolute Owner—Apportionment of Purchase-money.

4 Ch. D. 805. 808, 820 5 Ch. D. 245

A trustee having a discretionary trust for sale of real estate under a will at such price as he should think reasonable, with power to postpone the sale, leased the property for thirty years with the concurrence of the beneficiaries. Before the lease expired the property was put up for sale by the lessee and the trustee conjointly, the facts being disclosed by the particulars of sale, and a sale having been effected, the purchase-money was apportioned between the two interests according to the valuation of a skilled valuer:—

Held, that the purchaser was not entitled to insist on the concurrence of the beneficiaries on account of the valuation not having been made before the sale, and that the title would be forced upon him.

Observations on *Rede* v. *Oakes* (1).

Statement.

THIS was a vendor's suit for specific performance of a contract to purchase certain real estate formerly belonging to *Valentine Morris*, who died on the 6th of November, 1848, having by his will, which was dated the 26th of February, 1848, devised his real estate to trustees, who were now represented by *Richard William Morris*, the first-named Plaintiff, upon trust that they or the survivors or survivor of them should, at such time or times, and when and as he or they should think proper, absolutely sell and dispose of all his real estate, either together or in parcels, at one

(1) 4 D. J. & S. 505. 10 Jur. N.S. 1246

time or separate times, and either by public auction or private contract, for such price or prices, and subject to such stipulations as to title and other conditions of sale as to his trustees or trustee might seem reasonable, proper, or expedient. With regard to the application of the proceeds of the sale of the real estate, there was, amongst other trusts, one for raising £5000 for the benefit of one of the testator's daughters on her marriage, and there was an ultimate trust of the residue for the testator's five children equally.

The trustees postponed the sale of the real estate of the testator, which consisted chiefly of freehold house property at *St. Mary-on-Hill* and *Love Lane*, in the city of *London*, and the payment of the £5000 was secured by a deposit of the deeds; and by a deed of the 28th of February, 1863, to which the beneficiaries were parties, the real property was leased for thirty years from the 25th of December, 1862, at a rent of £330. This deed, however, was not acknowledged at the time of execution by one of the married daughters, but this omission was supplied at the time of the present sale.

The lease had subsequently become assigned to *William Holland*, the secondly-named Plaintiff, and the property had been sub-let by him at rents amounting in the aggregate to £670.

The £5000 charge having become payable, it was arranged to put up the property for sale by auction, and it was considered that a better price would be likely to be obtained by selling the entire property together, subject only to the underleases, than by sales of the leasehold interest and the reversion separately.

The property was accordingly put up for sale by auction in one lot, being set forth in particulars, which, after describing it in detail, including the underleases, continued: "The above property was leased by the trustees of the will of the late owner, *Valentine Morris*, Esq., with the concurrence of the parties beneficially interested under his will, for thirty years from the 25th of December, 1862, and has been let by the lessees or their assignee on underleases at the above rents. The assignee of the above lease will concur in the present sale, and so the property will be offered for sale subject to the above underleases only." In this particular the sale was in three places announced as being made by the trustee of Mr. *Morris's* will.

V.-C. M. 1876 MORRIS v. DEBENHAM. Statement.

The property was not sold at the auction, but on the 12th of August, 1874, an agreement was entered into by the Plaintiffs for the sale of it to the Defendant for £15,250, the contract signed being the formal contract appended to the particulars and conditions of sale prepared for the auction, which stated that the sale was made subject to the particulars.

The purchaser, amongst other requisitions on the title, made the following:—

"2. Unless the parties beneficially interested in the property had joined in the lease of 28th February, 1863, a sale subject to the lease could not have been enforced against a purchaser, nor can it now be sustained without some evidence that the beneficiaries had not sold or disposed of or settled their shares; but assuming that the proper persons were parties to the lease, the purchaser is advised that the present sale of the freehold and leasehold interests, the leasehold interests being vested in a third party subject to outstanding underleases, which fall in at different times, cannot be supported, such a sale not being warranted by the will of the late owner, and that consequently the parties who are the equitable owners must concur in the conveyance. It must, therefore, be shewn who these parties are.

"3. Have the equitable owners purchased the leasehold interest vested in Mr. *Holland?* If so, this is an additional reason why they should concur in the conveyance."

To these requisitions the following answers were made:—

"2. This statement, we contend, is incorrect, and we object to the equitable owners being called upon to concur in the sale. Mr. *Richard William Morris*, as surviving trustee of the testator's will, sells the freehold only, and Mr. *Holland*, as assignee of the lease of the 28th of February, 1863, sells his leasehold interest.

"3. No. Mr. *Holland* is to receive £3000 out of the purchase-money for his leasehold interest, and the balance, £12,250, is for the freehold interest."

By the replies to these answers requisition No. 2 was repeated and the purchaser insisted on the concurrence of the beneficiaries. But the vendors' solicitors, on the 13th of October, 1874, wrote to the purchaser's solicitors a letter in which the following passage

occurs: "Mr. *R. Morris* has not purchased, or agreed to purchase, Mr. *Holland's* interest in the lease of 1863. He alone sells the freehold, but for the benefit of his trust estate before the sale he arranged with Mr. *Holland* to concur in selling his interest and receiving £3000 for his leasehold interest, not from Mr. *Morris*, but the purchaser." They also refused to obtain the concurrence of the beneficiaries.

Statement.

The purchaser then refused to complete, and the present bill was filed.

There were affidavits by two independent surveyors, each of whom fixed upon £3226 as the proper proportion of the whole purchase-money attributable to the leasehold interest, and stated that it was very advantageous to the persons entitled to the beneficial interest to sell the lease and reversion together. One of them fixed the value of the reversion, if sold separately, at £10,200, and the other at £10,440; so that, on their evidence, there was a considerable profit on the transaction. It was arranged that £3100 should be paid to Mr. *Holland*, and the rest to Mr. *R. W. Morris*.

Argument.

Glasse, Q.C., and *Langworthy*, for the Plaintiffs:—

The Defendant attempts to bring this case within *Rede* v. *Oakes* (1), but that was a case where there were no sufficient *data* to enable any apportionment of the price to be made, and the apportionment then made was entirely arbitrary, and by persons who had no power to act in that manner. It was, moreover, open to question whether the trust property had not been injured by being put up for sale together with other property. There was at least no evidence that it was beneficial to sell the properties together. The present case is much more like *Cavendish* v. *Cavendish* (2), where such an objection as the present was treated as frivolous. There is nothing contrary to principle in selling two properties together at one price if a fair apportionment can be made: *Graham* v. *Oliver* (3).

The purchaser is, moreover, bound by the terms of the particulars, which gave him notice of the existence of the lease, and the

(1) 4 D. J. & S. 505. 10 Jur. N.S. 1246 (2) Law Rep. 10 Ch. 319.
(3) 3 Beav. 124.

V.-C. M. 1876

MORRIS v. DEBENHAM.

manner in which it was made, and of the fact that the vendor was a trustee: *Micholls* v. *Corbett* (1).

Argument.

J. Pearson, Q.C., and *E. Cutler*, for the Defendant:—

If the argument of the Plaintiffs succeeds, the burthen is thrown upon the purchaser of seeing whether, in the absence of the beneficiaries, the price is properly apportioned. And the particulars do not really disclose the interest of the lessee. There is nothing in them to shew that he had any beneficial interest in the property. The principle is the same whether a lease and reversion, or two adjoining plots of land, are sold. All that the requisition amounted to was, that it should be shewn that the beneficiaries were satisfied. The distinction between this case and *Cavendish* v. *Cavendish* (2) is that in that case the destination of the proceeds of the sale of the two properties was the same. Here the destinations are quite different. This case is exactly like *Rede* v. *Oakes* (3). If the trustee had fixed the price for the reversion before the sale, a title might possibly have been made. But that was not done, and it is too late to make an apportionment after the sale. In *Micholls* v. *Corbett* the decision was only that under the conditions of sale the purchaser had precluded himself from taking the objection, and there had been a suit to determine the rights of the beneficiaries. There is no case to be found in the books in which a trustee has, without the concurrence of the beneficiaries, put up property for sale, and together with it other property has been put up by a beneficial owner, and the sale has been allowed to stand. Moreover, it did not appear from the particulars that the concurrence of the beneficiaries could not be obtained.

Judgment.

MALINS, V.C., after referring to and commenting on the facts, continued:—

With regard to the objection to the title, it cannot be said, and indeed it is not attempted to be said, that a title has not been made to the reversion in fee or to the lease, or that the lease together with the reversion in fee does not make up a fee simple in possession. But the objection to the title is that the property was sold

(1) 3 D. J. & S. 18.
(2) Law Rep. 10 Ch. 319.
(3) 4 D. J. & S. 505.

at one entire price of £15,250, although the lease was the property of the assignee, and the reversion in fee was trust property. It is true the conditions of sale do not say that the lessee has any beneficial interest, or that any portion of the purchase-money will be attributable to him, but no one can read the particulars without seeing that the purchaser is buying subject to the lease. He might well have inferred that the lessee had some interest. It is said that property which is held in trust and property which is not held in trust cannot be put up in one lot together. I am of opinion that such an objection cannot be sustained. Something of the kind has undoubtedly been said in the case of *Rede* v. *Oakes* (1) by Lord Justice *Turner*, but the judgment proceeded on such technical grounds, and is open to such doubts, that I cannot look upon the case as applicable to the present one, and I certainly cannot sanction the notion that a sale under such circumstances is vitiated when the Court has provided ample means of ascertaining what portion of the purchase-money is attributable to the one and what to the other.

I went fully into the question in the case of *Cavendish* v. *Cavendish* (2), and I there negatived the notion that such an objection could be sustained, though both Mr. *Glasse* and Mr. *Phear* had argued for the opposite view with great energy and perseverance. In that case, *Cavendish House* and the house adjoining were put up for sale and sold at one entire price, it being erroneously assumed in the conditions of sale that General *Cavendish* was seised in fee simple of both houses, the fact being that *Cavendish House* was held in fee, and the adjoining house under a different title. I said in that case that the proper thing to be done was to ascertain what were the respective values, and apportion the purchase-money between them, and that if the concurrence of all persons was obtained the purchaser would get a good title to the fee simple, and that was all that could be required.

There was an appeal, and it seems that Mr. *Phear* argued that there were two properties vested in different trustees and held on different trusts, which were sold by one contract for one lump sum, which was to be paid into Court in a suit relating only to one of them. If provision had been made for apportioning the purchase-

(1) 4 D. J. & S. 505. (2) Law Rep. 10 Ch. 319.

V.-C. M. 1876 MORRIS v. DEBENHAM. Judgment.

money and paying the part attributable to the settlement to the proper parties, the purchaser would not have taken any objection, but payment into Court, in a suit which had nothing to do with the settlement, was no answer to the persons entitled under it. He said the case was governed by the case of *Rede* v. *Oakes* (1), and no doubt it was. But Lord Justice *James* said (2): "The sale of the two houses together is clearly beneficial to all parties, and the objection taken is of the most technical character. The purchase-money may, however, at once be apportioned in Chambers, which will only require an affidavit by the surveyor who has been employed about the sale. The part apportioned to 33, *Old Burlington Street*, may then be paid in to a separate account so as to distinguish it."

That question arose by reason of a purchase by trustees under a power by means of part of their trust funds of a freehold house, 33, *Old Burlington Street*. This house appeared to have been regarded by all parties as belonging to General *Cavendish*, subject to a charge, and was treated as included in the direction for sale of his adjoining house contained in the decree. The purchaser took the objection that it did not appear from the abstract that there was any right or power to sell the *Burlington Street* house in the lump with the *Cavendish* mansion as part of the estate of General *Cavendish*, and I decided that the objection was invalid, and ordered the purchaser to pay the money into Court.

Well, what applied to that case applies to this. There the money was apportioned, and here it must be apportioned also. How is that to be done? If the matter were brought before the Chief Clerk, all that would be required is an affidavit of the surveyor. Now, here there is the clearest evidence of value. There are the affidavits of two very eminent men, who both speak positively as to the proper price to be paid for the leases. They differ slightly only as to what would be the price if sold subject to a lease. I cannot see the use of sending this to Chambers to ascertain and settle that which my Chief Clerk could ascertain in a moment. Therefore I am of opinion that it is unnecessary to refer this to Chambers, because the vendor selling the reversion in fee is armed with the power of fixing the price, whether there be a sale of the lease and reversion together or not.

4 Ch D. 520

(1) 4 D. J. & S. 505. 10 Jur NS 1246. (2) Law Rep. 10 Ch. 321.

V.-C. M.
1876
MORRIS
v.
DEBENHAM.

On every ground I think the title a perfectly good one, and the objection one which ought never to have been taken, and perfectly unsustainable.

There must be a decree for specific performance of the agreement, and the title being so clear, and the objection so futile, the Defendant must pay the costs of the suit.

Solicitors: *Whites, Renard, & Co.; T. G. Bullen.*

JENNEY *v.* BELL.

V.-C. M.
1876
March 24.

[1875 J. 26a.]

Jurisdiction—Chancery or Bankruptcy—Composition Deed—Body of Creditors not interested—Rules of Court, 1875, *Order* XXXIV., *r.* 2; *Order* XL., *r.* 11.

A composition deed, by which all the creditors of a debtor agreed to accept a composition of 7*s.* 6*d.* in the pound on the amount of and in full discharge of their debts, was duly executed by all the creditors and registered under the *Bankruptcy Act*, 1861, and all the property of the debtor was assigned to a trustee to provide for the composition. The payment of part of one of the debts to which the Plaintiffs were now entitled was afterwards agreed to be postponed till all the other creditors had received their composition in full, and the entire estate then available was distributed in paying the composition on all the debts except the portion of the Plaintiffs' which was postponed. Some years elapsed, and it was then discovered that there was some real estate at *Monte Video* which had become vested in the trustee of the composition deed, and had remained unadministered, and the Plaintiffs instituted the present suit in the Chancery Division to have this property realized with a view to payment of the balance still due:—

Held, on motion by the trustee of the composition deed to have the proceedings stayed on the ground that the case ought to be dealt with by the Court of Bankruptcy, that the Chancery Division had at least concurrent jurisdiction, and that the fact that there was no body of creditors amongst whom a fund was to be distributed was a circumstance which made it expedient to exercise that jurisdiction:

Held, further, that the fact of the deed containing a clause which made it doubtful whether it came within the provisions of the 192nd and 197th sections of the *Bankruptcy Act*, 1861, would of itself be a strong ground for not compelling the parties to go to the Court of Bankruptcy.

Statement.

THE Plaintiffs were the beneficiaries under the will, dated the 31st of October, 1850, of *Richard James Jenney*, of *Port of*

V.-C. M. 1876 JENNEY v. BELL. Statement.

Spain, in *Trinidad*, who died on the 15th of March, 1853, the first-named Plaintiff, *Isabella Jenney*, being also his mother and sole legal personal representative, the will having been proved by her alone on the 13th of February, 1861, as executrix.

The Plaintiff *Isabella Jenney* was, on the 27th of August, 1863, as such executrix, a creditor of one *Andrew Mackintosh*, and by a deed of that date duly registered under the *Bankruptcy Act*, 1861, on the 2nd of September, 1863, and made between the Defendant of the one part and the creditors of *Andrew Mackintosh* of the other part, the whole of the property, real and personal, of *Andrew Mackintosh* was conveyed and assigned to the Defendant upon trust that he, his heirs, executors, administrators, or assigns, should convert the same into money and pay thereout to the creditors of *Mackintosh* such sums, in proportion to the amount of their debts and in full satisfaction thereof, as should together amount to the sum of 7*s.* 6*d.* in the pound on their respective debts.

By a subsequent arrangement, however, the Plaintiff *Isabella Jenney* agreed to accept the composition of 7*s.* 6*d.* upon a portion only of her debt amounting to £478 8*s.* 2*d.*, and to postpone all payments upon the balance of £3000 till the composition of 7*s.* 6*d.* had been paid upon all the other debts. The estate then in the hands of the trustee was accordingly distributed so as to provide for payment of the composition on the claims of all the creditors, except the proportion of the debt of *Isabella Jenney*, and she received only £178 13*s.*, being the composition on the £478 8*s.* 2*d.*, and for a period of twelve years nothing further was done.

The Plaintiffs had recently discovered that there was certain property at *Trinidad* which belonged to *Andrew Mackintosh* at the date of the composition deed, and had consequently vested in the trustee, and they accordingly instituted the present action in the Chancery Division of the High Court. The Plaintiffs averred by their statement of claim that, though the Defendant had been offered an indemnity by them, he refused to convert the property into money, or otherwise raise thereout sufficient to satisfy their claim. They asked for an account of what was due to *Isabella Jenney* on account of her debt, and an inquiry what property there was of *Andrew Mackintosh*, and for payment thereout of what was due.

Statement.

The 2nd paragraph of the Defendant's statement of defence raised the following case :—

"The said indenture of the 27th day of August, 1863, was duly registered in the Court of Bankruptcy in *London* on the 2nd day of September, 1863, in accordance with the provisions then in force of the *Bankruptcy Act*, 1861, and all the conditions required by the same Act were duly complied with in respect of the said indenture, and the said indenture accordingly became and was a binding deed upon all the creditors of the said *Andrew Mackintosh*, so that the said *Andrew Mackintosh* and all his creditors, and the Defendant, the trustee of the said indenture, became and were, and the survivors of them now are, subject to the jurisdiction of the Court of Bankruptcy, and entitled to the benefit of, and liable to all the provisions of, the said *Bankruptcy Act*, 1861, in the same manner as if the said *Andrew Mackintosh* had been adjudicated a bankrupt, and the creditors had proved, and the Defendant had been appointed creditor's assignee under such bankruptcy; and the Defendant submits that this Court ought not to entertain jurisdiction of the matters mentioned in the Plaintiffs' statement of claim, and that the Plaintiffs could have a complete and effectual remedy for all such rights (if any) as they are entitled to in respect of such matters in the Court of Bankruptcy, to which they ought to resort."

The statement of defence also averred that the property at *Trinidad*, if recoverable at all, could only be recovered by legal proceedings at *Trinidad*, which would necessarily be attended with great expense, that the Defendant had no funds under the indenture wherewith to pay the costs of such proceedings, or any of them, and that the Plaintiffs had not offered to supply the Defendant with money for the purpose.

The Defendant now moved for an order staying proceedings in the action.

Argument.

Glasse, Q.C., and *Hamilton Humphreys*, in support of the motion :—

This motion is made under rule 2 of Order XXXIV., and rule 11 of Order XL. of the Rules of Court, 1875. The defence is one

V.-C. M. 1876 JENNEY v. BELL. Argument.

which, if made under the old practice, would have been made by plea, and under the present Rules is made by motion. The 2nd paragraph of the statement of defence is framed on the model of the plea in *Martin* v. *Powning* (1), and raises exactly the same issue. The point is that the Court of Bankruptcy has, under the composition deed, complete jurisdiction to deal with the subject-matter of the suit, and there is nothing in the circumstances of the present case taking it out of the rule which follows from that case that this Court will leave the matter to be dealt with in the Court which has already acquired seisin of the subject-matter of the action.

Higgins, Q.C., and *Medd*, for the Plaintiff:—

There may be a question whether this motion comes strictly within the rules cited in support of it, but it is not necessary to go into that, because there is a substantial objection to the order asked for. *Martin* v. *Powning* was decided on the principle which it and other cases have established, that the jurisdiction of the Court of Chancery is not taken away by the Bankruptcy Acts, but that it is a matter of discretion in every case whether the Court of Chancery will continue to exercise its jurisdiction notwithstanding that proceedings in bankruptcy have been taken.

In this case the admitted facts are that nothing was done under the deed for twelve years, and that the Plaintiff *Isabella Jenney* is the only remaining creditor, and the Plaintiffs the only persons interested in realizing the property, and the Plaintiff *Isabella Jenney* has a legal right to sue for this estate. The argument now brought forward has been frequently raised. One case where this was done was *Colthurst* v. *Smith*, which was heard here on the 31st of July, 1873, and in the Court of Appeal on the 16th of December, 1873, and the right to come to the Court of Chancery was maintained. The same contention was also raised in *White* v. *Simmons* (2) and *Ellis* v. *Silber* (3), and in both the right to proceed in Chancery was upheld; and that the mere registration of the deed under the *Bankruptcy Act* does

(1) Law Rep. 4 Ch. 356. (2) Law Rep. 6 Ch. 555.
(3) Law Rep. 8 Ch. 83.

not take away the jurisdiction of the Court was determined in *Phillips* v. *Furber* (1); and that it does not deprive the Court of its ordinary powers in *In re Donisthorpe* (2). *Martin* v. *Powning* (3) does not conflict with any of those cases or apply to the present case, because there the bankruptcy was still pending; and in *Graham* v. *Winterson* (4) the matter was left to the Court of Bankruptcy, because it arose out of and was really part of the administration of the bankrupt's estate. There are, in fact, only two cases besides *Martin* v. *Powning* which give any colour to this motion. The first is *Bell* v. *Bird* (5), in which there was property to be administered for the benefit of the creditors; and the Court, on the authority of *Riches* v. *Owen* (6), treated the matter as being one which could only be dealt with properly by the Court of Bankruptcy. The other case is *Stone* v. *Thomas* (7), in which, though the jurisdiction of the Court of Chancery was fully recognised, the Court declined to exercise it, because there was still estate to be distributed amongst the creditors If there were any question here as to which is the proper Court, it would be determined by the fact that this deed contains a clause similar to that in *Dell* v. *King* (8). It is, therefore, certain that in bankruptcy the validity of the deed as a composition deed under the 197th section of the Act would be disputed, and it would seem that its invalidity must be allowed, and the jurisdiction of the Court of Bankruptcy would thus be ousted. But this consideration does not affect the validity of the deed in this Court.

Glasse, in reply:—

Martin v. *Powning*, *Stone* v. *Thomas*, and *Graham* v. *Winterson*, are clear authorities shewing that the Court of Bankruptcy is the proper Court for a case like this, even where, as in the two latter, questions of fraud were raised. The Plaintiffs cannot gain jurisdiction for this Court by neglecting to carry on the proceedings in the Bankruptcy Court. *Colthurst* v. *Smith* does not apply. It only decided that the remedies of a mortgagee

(1) Law Rep. 5 Ch. 746.
(2) Ibid. 10 Ch. 55.
(3) Ibid. 4 Ch. 356.
(4) Ibid. 16 Eq. 243.
(5) Law Rep. 6 Eq. 635.
(6) Ibid. 3 Ch. 820.
(7) Ibid. 5 Ch. 219.
(8) 33 L. J. (Ex.) 47.

V.-C. M. 1876 JENNEY v. BELL. Judgment.

are not taken away by the *Bankruptcy Act*, for which a decision was hardly needed.

MALINS, V.C., after referring to the facts, continued:—

The defence in this case amounts to a plea to the jurisdiction, the special point being that the case is not one for Chancery but for Bankruptcy. Now the *Judicature Act*, 1873, by sect. 24, sub-sect. 5, abolishes the injunction staying proceedings in an action, and provides that any person who would have been entitled, if the Act had not passed, to apply to any Court to restrain the prosecution of any action, shall be at liberty to apply, by motion in a summary way, for a stay of proceedings in such cause or matter. It is, therefore, clear that if this is a case for bankruptcy, Mr. *Glasse* is right in coming here to ask for an order stopping the action. Then the question is, whether this is or not a case in which there is exclusive jurisdiction in bankruptcy; because I am of opinion that if the Chancery Division has concurrent jurisdiction, the question raised in the action can be more conveniently decided here than in the Court of Bankruptcy, and this action must go on.

Now I think that all the cases which have been cited shew that the jurisdiction of this Division is not ousted, and it is a question for the discretion of the Court in each particular case whether it should be exercised or not. One case cited was *White* v. *Simmons* (1), in which the Court of Appeal, reversing a decision of Vice-Chancellor *Stuart*, held that a mortgagee was entitled to sue in Chancery, notwithstanding the bankruptcy of the mortgagor. That case followed the case of *Martin* v. *Powning* (2), and I suppose that Vice-Chancellor *Stuart*, having in his mind the fact that his decision in *Martin* v. *Powning* had been reversed, deduced from it that *White* v. *Simmons* was not a case for the Court of Chancery. But then Lord *Hatherley* took the opposite view, so Vice-Chancellor *Stuart* was reversed both times, and the latter case distinctly decided that the jurisdiction of the Court of Chancery is not ousted by the *Bankruptcy Act*. Between these cases came the case of *Stone* v. *Thomas* (3), and I suppose the

(1) Law Rep. 6 Ch. 555. (2) Law Rep. 4 Ch. 356.
(3) Law Rep. 5 Ch. 219.

Vice-Chancellor *Stuart* had felt so much difficulty with regard to *Martin* v. *Powning* (1), that at his request it was heard by the Lord Chancellor. Lord *Hatherley* in the judgment in that case thus expresses himself (2): "I feel no doubt that there is jurisdiction in this Court if it thinks fit to exercise it. I do not think that *Martin* v. *Powning*, or any other case, has decided that the jurisdiction of this Court is ousted by the Court of Bankruptcy. But that case has declared that in the case of a creditor's deed the whole matter has been given to the Court of Bankruptcy, and that it is more convenient that the trusts should be administered there, and that this Court will not interfere unless there are some special circumstances to call for such interference. I take it that the rule as to jurisdiction is this: that the jurisdiction of this Court is not ousted unless there is an express enactment in the statute which provides a new jurisdiction."

Now, therefore, I think all the authorities shew that the Court of Chancery retains jurisdiction, notwithstanding the case of a bankruptcy, and may exercise it in a proper case. There was *Colthurst* v. *Smith*, in which it was very strenuously argued before me that when a mortgagor had become bankrupt, the Bankruptcy Court must be resorted to by the mortgagee in order to realize his security. I, however, decided the contrary. The case was appealed, and the Court of Appeal agreed with me.

It is clear, therefore, that the Court of Chancery would exercise its jurisdiction in such cases when it was expedient that it should do so. And I think that Mr. *Medd* gave a very good reason why it is expedient in this case that the jurisdiction of this Division should be so exercised. He cited a case of a deed precisely like this, which was held not to be a good composition deed. If this deed is not good under the 192nd section of the *Bankruptcy Act*, 1861, it is not within the protection of the 197th section. And I think there is not much doubt that this particular deed is void as a composition deed. But it is still sufficiently good to enable persons claiming under it to come here.

What is the inconvenience of coming here? Nothing. What is the advantage? If the parties are sent to the Bankruptcy Court, all this process must be gone over again. And as it

(1) Law Rep. 4 Ch. 356. (2) Law Rep. 5 Ch. 223.

V.-C. M. 1876 JENNEY v. BELL.

appears that the Defendant is a trustee for one party only, it is evident that all that is required can be conveniently effected under directions made in this Division.

Then there is the objection that the Defendant cannot be expected to litigate for other persons, and therefore, having no funds, cannot take a step without an indemnity. It may be quite right that such an indemnity should be given, but when this is to be done it is not for me to say now. I have only to decide the question whether the action can be maintained. The question is whether the jurisdiction of this Court is ousted. I think it is not, and therefore I must refuse the motion.

Solicitors: *Maples, Teesdale, & Co.; Johnson & Weatheralls.*

V.-C. M. 1876 *March* 19, 25.

ATTORNEY-GENERAL *v.* ST. JOHN'S HOSPITAL, BATH.

[1864 A. 96.]

Charity Scheme—Eleemosynary or Ecclesiastical—Trustees—Religious Opinions.

The charity of *St. John's Hospital, Bath*, with the chapel of *St. Michael* annexed, was founded for the support of a certain number of poor persons of both sexes, not being restricted to any particular religious denomination. The Master of the Hospital was to be a member of the Church of *England*, who was to receive a fixed stipend, and perform the service in the chapel according to the Liturgy of the Church of *England*. The trustees of the charity were to manage the trust property and to appoint the Master, to repair and maintain the chapel attached to the hospital, and to elect the almspeople:—

Held, that the primary object of the charity was eleemosynary, and that it was not necessary that the trustees should be confined to persons holding the doctrines of the Established Church; and a scheme for the management of the charity was directed to be altered by striking out any religious restriction.

Statement.

THIS was an information filed by the Attorney-General in August, 1864, against the Trustees and the Master and Co-Brethren and Sisters of *St. John's Hospital, Bath*, for the purpose of having a scheme settled for the future management of the charity.

The scheme had been prepared and settled, except as to one

point, having reference to the persons to be appointed trustees of the charity. The first clause of the scheme provided as follows:—

"The charity and the property thereof shall be under the management and control of trustees. The trustees of the charity shall consist of such of the trustees for the time being, appointed pursuant to the provisions of the Act of Parliament, 5 & 6 Will. 4, c. 76, to be trustees of the municipal charities formerly vested in the corporation of the city of *Bath*, as shall be members of the Church of *England* who shall be *ex officio* trustees of the charity. No trustee shall act in the administration of the charity until he shall have signed a memorandum to the effect that he is a member of the Church of *England*, and is willing to undertake the trust as regulated by this scheme."

The Defendants were desirous that the words creating a restriction as to the religious opinions of the trustees should be omitted from the scheme.

The Attorney-General objected to the proposed alteration in the scheme.

The other clauses in the proposed scheme having reference to this question were:—

"18. The master of the hospital shall be a clergyman of the Church of *England* in priest's orders. The right of presentation of the master is vested in the trustees for the time being appointed in pursuance of the Act of Parliament, 5 & 6 Will. 4, c. 76, to exercise the power in that behalf formerly vested in the corporation of the city of *Bath*."

"21. The master shall have the superintendence of the hospital under the general direction and control of the trustees.

"22. The chaplain, so long as there shall be a chaplain, and afterwards the master, shall read prayers every morning, and perform two full services every Sunday in the chapel of the hospital according to the ritual of the Church of *England*, and shall perform one full service there once at least on every Christmas Day, Good Friday, and days of public fast and thanksgiving. The chaplain or master shall also visit the inmates of the hospital in sickness or otherwise, as there shall be occasion."

"24. The number of almspeople in the hospital shall be twelve,

V.-C. M. 1876

ATTORNEY-GENERAL v. ST. JOHN'S HOSPITAL, BATH.

Statement.

subject to the increase as hereinafter mentioned, and any vacancy in such number shall be filled up by the trustees in manner hereinafter mentioned.

"25. The persons elected to be almspeople in the hospital shall be poor persons of either sex who shall have been resident in, or ratepayers of, the municipal borough of *Bath* for at least three years immediately preceding the date of election, and who shall have attained the age of fifty-five years at the least. Provided always that no person shall be elected who shall have been in the receipt of parochial relief within twelve months next preceding the time of election."

"28. Accommodation for all the almspeople shall be provided in the chapel of the hospital, but it shall not be obligatory on the almspeople to attend the services performed therein."

"35. The chapel of the hospital shall be open to all persons at the time of Divine service, and (after providing for the due accommodation of the inmates of the hospital) all the sittings shall be free. The trustees shall provide and expend the moneys required for the necessary expenses connected with the chapel and the performance of Divine worship therein out of the income of the charity."

"37. The trustees shall keep the hospital buildings and premises, including the chapel, in good and sufficient repair, and sufficiently insured against damage by fire; and the expenses thereof, and the rates and taxes, shall be paid out of the income of the charity."

The information stated that the proper settlement of the charity might be considered as derived under an award of Sir *John Trevor*, Master of the Rolls, dated the 13th of February, 1716, to which all parties consented to submit. By that award it was stated that the hospital appeared to have been founded in 1711 by one of the Bishops of *Bath* and *Wells* (although the particular foundation did not appear), and that it had consisted of a master, six brethren and six sisters, who had been kept very poor and indigently; and he found also, by the grant to the said hospital and by the admission of all parties, that by the charity of pious persons the hospital had been advanced to great pos-

sessions, the improved value thereof being then £1200 per annum, or thereabouts; and that, although there had been £130 per annum reserved rent to the hospital, yet he found that the said hospital had been all along very much neglected and badly provided for, and very negligently as to the service of God, for although there was a chapel called *St. Michael*, which was annexed to the mastership of the hospital, and was a living presentable with cure of souls, yet that it was sometimes turned into an alehouse, and at other times into a post-office, and that the abbots of *Bath* formerly took on them to be masters of the said hospital, and that Queen *Elizabeth* having in the fifteenth year of her reign granted the presentation of the mastership of the said hospital to the mayor and corporation of *Bath* for the time being, they, about the year 1616, made an order that the mayor of *Bath* for the time being should be master of the said hospital, whereunto the mayors of *Bath* had taken on them to be masters and to dispose of the possession and revenues belonging to the hospital as they pleased. It was then stated that "for the final award, determination, and settlement of all and singular the premises to him referred, and for settling all disputes that had or should arise touching or concerning the management of the said hospital and of the possessions and revenues thereof for the present and time to come, and for giving satisfaction to the contending parties in respect of their several claims, and for the better and more orderly government of the said hospital, and for a better provision for the poor thereof, and for the rebuilding of the said chapel, and for the more due and decent daily service to Almighty God to be performed daily in the chapel of the said hospital, and for repairing the said hospital, and for establishing rules and orders for the management of the same, he, the said Master, did thereby award, order, adjudge, and determine in the manner following."

The award first provided for the settlement of various questions relating to the leases and property of the charity. It then provided that the master of the hospital for the time being should keep in hand and possession the house called *St. Michael's Chapel*, then in possession of Mrs. *Collins*, and that the same should not be leased any more, but that the same should be enjoyed by the said Mrs. *Collins* during her life, she being a poor widow, and claiming

V.-C. M. 1876 ATTORNEY-GENERAL v. ST. JOHN'S HOSPITAL, BATH. Statement.

a tenant's right, and not being able to renew, she paying the rent of 2*s.* per annum reserved on the former lease, and keeping the same in repair, and not turning or converting the same into a public-house, and that after her death the master of the said hospital should dwell therein or let it from year to year as he thought fit, so as it might not be used as a public-house or anything like it.

That the building then used as a chapel should be, with all convenient speed, rebuilt, and be for ever used as a chapel for the hospital, and that the poor people's apartments should be also repaired and made more convenient, and that the chapel should be built and furnished according to a contract already entered into with a builder therein named.

The award then provided for the payment of various small sums out of the revenue of the charity, and it was declared that the right of presentation of the said master belonged to the corporation of *Bath* by the grant of the 15th of *Elizabeth*, but that they had no right to be visitors, nor were the poor people of the said hospital under any obligation to appear at the abbey church or to attend the mayor or corporation, and they were thereby discharged of and from all such attendance for the future, and that the government of the said hospital should be in the master for the time being according to such rules and orders as were thereunto annexed, and that the brethren and sisters should be obedient to him.

That the said master should take care that prayers were duly read in the said chapel morning and evening every day, as well on Sundays as week days, according to the Liturgy of the Church of *England;* and, further, the said master was thereby enjoined from christening, marrying, or burying any person or persons in the said chapel except the burying the poor of the said hospital in the said chapelyard and ground as had been formerly done.

That the Lord Chancellor, Lord Keeper, the Master of the Rolls, and Lord Bishop of *Bath* and *Wells*, for the time being, or any two of them, should from time to time respectively for ever be visitors of the hospital.

That every person to be admitted into the said hospital should be such as had been known to be of a sober and civil conversation,

and conformable to the established government in Church and State, and should be most in want and best deserve.

That no person should be admitted into the hospital but such who were not married, and none under fifty years of age unless disabled.

That every person admitted should duly resort in his or her livery gown to morning and evening prayers in the chapel belonging to the said hospital, unless detained by sickness or some other urgent occasion.

Statement.

By an order of the Court of Chancery, made on the 12th of November, 1853, the several persons then being trustees of the municipal charities of the city of *Bath* were appointed trustees of the right of presentation to the mastership of the said hospital. The Defendants hereto were the present survivors of the persons appointed trustees.

Several affidavits were filed for the purpose of shewing that the opinions of the trustees and of the inhabitants of *Bath* were opposed to any restriction being introduced into the scheme as to the religious opinions of the trustees.

Cotton, Q.C., and *Vaughan Hawkins*, for the Attorney-General:—

Argument.

We say this charity is really an ecclesiastical foundation, but if it is not, then the Court will have regard to the religion of the founder. The founder of this charity was of the Church of *England* as then established, and the foundation is now, to all intents and purposes, a Church of *England* charity. The advowson was granted by Queen *Elizabeth* in 1573. It is an advowson with right of presentation—a living presentable with cure of souls. The chapelry is an essential part of the hospital. It is not a private chapel for the use of the almspeople, but a public chapel. It is, therefore, an ecclesiastical charity with certain eleemosynary objects forming part of the foundation, and in such a case it must be considered an ecclesiastical foundation according to a passage in *Rolle's* Abridgment (1), where it is said: "There cannot be an exchange between a lay hospital and a prebend, because the one is lay and the other is spiritual; but it is different if the hospital is spiritual, as it is when it is founded for alms and for

(1) Page 11.

V.-C. M.
1876
ATTORNEY-GENERAL v. ST. JOHN'S HOSPITAL, BATH.
Argument.

things spiritual. But supposing there is in the foundation of the hospital an object which is spiritual as well as that which is eleemosynary, the spiritual being considered higher in degree attracts to it and fixes the nature of the hospital." If the chapel had been private the chaplain would not have been instituted, but would have been simply licensed by the bishop of the diocese. In the case of *Attorney-General* v. *St. Cross Hospital* (1) there was no cure of souls attached to the chapelry, and that was the cause of its being declared a lay foundation, and under the scheme all the trustees were members of the Church of *England*. In the *Valor Ecclesiasticus* the charity is referred to amongst the spiritual promotions in the archdeaconry of *Bath;* and in *Dugdale's* Monasticon it is stated "Queen *Elizabeth* granted the advowson in 1578 to the mayor and commonalty of the city of *Bath*." The trustees under the present scheme will have the management of the charity, and they will have the appointment of the master, who is to be a member of the Church of *England*. It is essential, therefore, that this duty should be performed by trustees who are members of the Church. There is no separate foundation here for the chapel and for the hospital; it is treated as one foundation.

It has long been established that the trustees must be of the religion of the founder: *Shore* v. *Wilson* (2); *Attorney-General* v. *Murdoch* (3); *Attorney-General* v. *Pearson* (4); and *Attorney-General* v. *Bunce* (5). When this charity was discussed in *In re St. John's Hospital* (6), it was decided that it was one which, under the 71st section of the *Municipal Corporations Act* (5 & 6 Will. 4, c. 76, s. 71), would vest in the corporation as charitable trustees, the circumstances of the case shewing that the right in question was thus vested, not for the benefit of the corporation, but for that of a charitable institution independent of the corporation. The Attorney-General has not, under this scheme, selected the trustees on the ground of their being trustees under the *Municipal Corporations Act*, but as a matter of concession to the inhabitants of *Bath*. Still we are not on that account bound to take all those trustees when we find that their religious opinions

(1) 17 Beav. 435.
(2) 9 Cl. & F. 355.
(3) 7 Hare, 445.
(4) 7 Sim. 290.
(5) Law Rep. 6 Eq. 563.
(6) 3 Mac. & G. 235.

are at variance with their duties as trustees. At present there are only three Dissenters to ten Churchmen among the trustees, but if there should come to be a majority of Dissenters among the trustees it is impossible to see how far this may affect the religious constitution of the charity. Their opinions will have a strong influence upon the management as regards the appointment of the master and the outlay which may become necessary upon the fabric of the church.

Bristowe, Q.C., and *Jolliffe*, for the trustees of the charity appointed in pursuance of a decree of Lord *Truro*, as reported, *In re St. John's Hospital* (1):—

The decision of this question depends upon whether the charity is eleemosynary or ecclesiastical. If it is eleemosynary, then the religious feelings of the persons who are to act as trustees of the charity have nothing to do with the case, but if it be ecclesiastical —either ecclesiastical proper or scholastic—then the religious ideas of the founder must be taken as the groundwork of what the founder's intention was, and then it is a question whether those ideas and intentions can be properly carried into effect except by the appointment of trustees who entertain the same religious opinions as the founder. The founder in this case was a Roman Catholic, which was then the established religion of the country, consequently the charity is only in that sense a Church of *England* charity. The real object of this charity was the support and maintenance of a certain number of poor persons, and ancillary to this there was to be a master appointed who was to read prayers and perform service with the Liturgy of the Church of *England* in the chapel attached to the hospital. If this charity is eleemosynary, then the rule laid down in *Attorney-General* v. *Calvert* (2) applies, and the trustees need not be members of the Church of *England*. In *Baker* v. *Lee* (3) the principal object of the charity was religious, but the surplus was to be applied to the repair of the roads. Even then great diversity of opinion existed among the Judges as to what class of trustees should be appointed, although finally it was settled that they must be members of the Church of *England*. In

(1) 3 Mac. & G. 235. (2) 23 Beav. 248, 257. 3 Jur. N.S. 501.
(3) 8 H. L. C. 495. 7 Jur. N.S. 1.

V.-C. M. 1876 ATTORNEY-GENERAL v. ST. JOHN'S HOSPITAL, BATH. Argument.

this case the hospital is the main object and the chapel the secondary object, inasmuch as it is attached to the hospital. In *Attorney-General* v. *St. Cross Hospital* (1), where the question was whether the charity was lay or ecclesiastical, it was held that the founder's direction that the master should be a clerk in holy orders did not make it a spiritual foundation. The cases such as those in which Lady *Hewley's* charity was discussed, and where the particular religious opinions of the founder were considered important as governing the principles of the charity, have nothing to do with this case.

By the decree of Lord *Truro* the charity was vested in the charity trustees within the meaning of the Act 5 & 6 Will. 4, c. 76, s. 71, and at no time have the religious opinions of the trustees been raised as a ground for their non-appointment. The trustees have always worked together harmoniously, notwithstanding there have been a few Nonconformists among them, and they all desire that no religious restriction should be inserted in the present scheme. There are now thirteen trustees, ten of whom are Churchmen and three Dissenters, but all the Churchmen are in favour of retaining the Nonconformists. The almspeople in this case are not confined to members of the Established Church, they may be Nonconformists of any denomination. This principle should apply as well to the trustees. They have no religious duties to perform except to nominate the master, who must of necessity be a minister of the established religion, and to repair and maintain the chapel. The other duties are the management of the charity property, which will at a future time amount to as much as £10,000 a year, and to nominate the almspeople. All these duties can be performed by Nonconformists as well as they would be by members of the Church of *England*.

Davey, Q.C., for some of the inhabitants of *Bath*, took the same line of argument.

Cotton, in reply:—

The duties of the trustees of this charity will be quite distinct from any other duties the municipal authorities have to perform;

(1) 17 Beav. 435.

we take Churchmen as trustees in preference to Dissenters, because Churchmen are equally well adapted to carry on both the ecclesiastical and eleemosynary purposes of the Act, while Dissenters are only adapted to the eleemosynary purposes, and less fitted for ecclesiastical purposes. This was the view taken by Lord *Wensleydale* with regard to the charity discussed in *Baker* v. *Lee* (1).

Argument.

The trustees now to be appointed are, as to many of the duties, to take the place of the master, who was formerly the person to manage the charity and to select the almspeople. The master was to be a priest in holy orders, and the trustees ought now, in his place, to be Churchmen.

The opinions of the inhabitants of *Bath* as expressed in the affidavits filed in this case, and the expressions used at public meetings, can have no effect in guiding this Court as to its decision upon the important principle involved.

MALINS, V.C.:—

Judgment.

The question which has been argued before me at great length, occupying two entire days, arises out of the scheme for the administration of the charity called the *Hospital of St. John the Baptist*, with the chapel of *St. Michael* annexed, in the city of *Bath*. This is a charity which was founded so long ago as the year 1171, by the then Bishop of *Bath* and *Wells*. There is no deed of foundation, nor is there any distinct information what the objects of the founder of this charity were; but as he was a bishop of the then Established Church, that is, the Roman Catholic Church, which church was afterwards reformed, and is now the Church of *England*, it may well be supposed that, if we are to regard the will of the founder, not only all the objects of the charity, but those who were to administer it, must be of the same denomination, that is, members of the Church of *England*. But there having been great abuses of the charity so long ago as the year 1713, an information was filed, and the matter came before the then Master of the Rolls, Sir *John Trevor*, who acted as arbitrator in the matter, and made an award on the 13th of February, 1716. That states the

(1) 8 H. L. C. 518.

V.-C. M. 1876 ATTORNEY-GENERAL v. ST. JOHN'S HOSPITAL, BATH. Judgment.

origin of the charity. [His Lordship then stated the terms of the award made by Sir *John Trevor*, and also the terms of the scheme now proposed by the Attorney-General, and continued:—] It is plain by the scheme now proposed that Nonconformists, or Dissenters, and even Roman Catholics, as far as I can see, are just as eligible to be objects of this charity as members of the Church of *England*, and they need not even attend the chapel in which the Liturgy of the Church of *England* is to be read. I find, according to the scheme, they may totally absent themselves and go to a dissenting church, yet they would remain inmates of these almshouses, and be in every respect entitled to do so. The charity consists of a master and these poor almspeople, and the scheme provides that the master must be a clergyman of the Church of *England* in priests orders, and the right of presentation is not to be in the corporation of *Bath*, but it is to be in the trustees of the charity property of *Bath*. That is a body which the evidence shews at present consists of thirteen persons, ten of whom are members of the Church of *England*, and three are Nonconformists, or Protestant Dissenters, that is the body in whom the right of selecting the master is vested.

Now, what are the duties that the trustees have to perform with reference to any particular religious tenets? First, they are to select a minister or clergyman of the Church of *England*, who must be in priest's orders. Then, if he is a minister, a clergyman of the Church of *England*, he is possessed of the necessary qualification. There can be no miscarriage in that respect, because it is impossible for them to select any other person than a person who has that qualification. What is the other duty which they have to perform in any way connected with particular religious tenets? The only other duty is that they are to keep the chapel in repair. Therefore, having one duty to perform in which it is impossible any Dissenter can miscarry, because he must select a minister of the Church of *England* in priest's orders, they also have the superintendence of the repairs of the chapel, and have to see that it is kept in proper repair.

Now, with regard to the nature of the charity, I may say, on the proceedings in this information, it has appeared that great abuses have been practised with respect to leasing the property of

this charity. It has been so dealt with that it is now let on lease for lives which will produce £900 a year, but under this scheme those leases not being renewable, as they have been in practice for a century or two past, the charity will, as these leases expire, ultimately produce over £10,000 a year. The houses belonging to it are very numerous; in *Bath* they number more than 200, necessarily producing a very large rent. Therefore it will be a very rich charity hereafter, and it is a charity of considerable possessions now.

Then it appears the master is to have a stipend of £150 a year, and the chapel is to be kept in repair. What are the objects of this charity beyond these two things? Purely eleemosynary. Under the 25th clause the persons elected to be almspeople in the hospital are to be poor persons of either sex. They are to be twelve, because the funds are only adequate to support twelve at present, but as the funds increase they are to be increased in number, so that the objects of the charity will increase as the leases fall in and the income increases.

Under these circumstances, the only thing I have to consider is this:—It is proposed, and agreed on all hands, that the charity property shall be under the management and control of trustees. The question is, Who are those trustees to be? The scheme which is submitted for my approval is this:—"The trustees of the charity shall consist of such of the trustees for the time being appointed pursuant to the provisions of the Act of Parliament, 5 & 6 Vict. c. 76, to be trustees of the municipal charities formerly vested in the corporation of the city of *Bath* as shall be members of the Church of *England*, who shall be *ex officio* trustees of the charity;" and to prove they are so before they undertake the duties of trustees, they are to sign a memorandum declaring that they are members of the Church of *England*.

Now, the general principles applicable to cases of this kind, I am happy to say, have not been in dispute. The principle established by Lord *Eldon's* judgment in *Attorney-General* v. *Pearson* (1), acted upon and finally confirmed and settled by the great case with regard to Lady *Hewley's* charities, is this, that where there is a charity for the purpose of education in particular reli-

(1) 3 Mer. 353.

V.-C. M. 1876 ATTORNEY-GENERAL v. ST. JOHN'S HOSPITAL, BATH. Judgment.

gious opinions and particular religious tenets, or where there is a charity, and the objects of that charity must be persons holding particular religious opinions, or having particular religious tenets, it must be governed by trustees whose opinions are in conformity with those objects. If, therefore, such a charity is founded as a Church of *England* charity, where the recipients must be members of the Church of *England*, and where no other tenets than those of the Church of *England* are to be inculcated, then the governing body must be of the same class, and none but members of the Church of *England* will be permitted to be trustees of such a charity. In Lady *Hewley's* case it was decided that she was not a member of the Church of *England*, and it was also decided that she was not a Unitarian. Those two things were positively decided. That at once excluded from the administration of that charity all members of the Church of *England*, and all members who entertained Unitarian opinions; and it was decided that that being a charity founded for the purpose of religious education, and where the objects of the charity were persons who entertained the same opinions, that is, Protestant Dissenters or Nonconformists, no person could have any voice in the government of that charity who was not a Protestant Nonconformist. The real difficulty in that case was to ascertain of what religious body existing in *England* at the time of the foundation of her charity—which, I think, was in 1714—she was a member. The contest was one of a very protracted nature, costing an immense amount of labour, time, and expense, such perhaps as was never expended in any other litigation. It was begun in 1842, and not ended till about 1856. When I was counsel in the case the two points had been decided before that date that neither members of the Church of *England* nor Unitarians could be trustees of that charity. The great contest then arose as to which of the three denominations of Protestant Dissenters which then existed in *England* Lady *Hewley* belonged, namely, the Congregationalists, that is, Independents, Baptists, or Presbyterians. The weight of evidence, I think, was in favour of her being a Presbyterian; but it was so absolutely impossible to determine that question that it ended at last in a compromise, by which three Presbyterians, two Baptists, and two Congregationalists were taken, merely because it could not be ascertained to

which she belonged. That branch of the case will be found reported in 16 Sim. 210. But the principle as regards Protestant Dissenters is the same as that which is applicable to the Church of *England*. Where it is a religious foundation for religious objects, the charity must be governed by those whose opinions are in conformity with the opinions of the founder.

Now, therefore, if the Bishop of *Bath* and *Wells*, who in 1174 founded this charity, had founded it for purely religious objects, and had made it a condition that none but those who entertained the opinions of the Established Church, that is, the Established Church as it was in that day, reformed at the time of the Reformation, and now the Established Church called the Church of *England*, it would have followed as a pure matter of course that this charity could only be governed by those who were members of the Church of *England*. But he has not laid down any such rule. It appears from all the proceedings referred to that, beyond the objects which I have referred to, namely, the appointment of the master, whose qualification is defined, and the maintenance of the chapel, that is, keeping it in repair, this is a purely eleemosynary charity. The whole of the funds, after paying the master his stipend of £150 a year and keeping the chapel in repair, large as they are now, and larger as they will be, are devoted purely to eleemosynary purposes, namely, to maintain as many poor brethren and sisters of this hospital, or the enlarged hospital which may exist, as its funds will afford to maintain.

All the cases to which I have adverted, such as the *Attorney-General* v. *Pearson* (1), and *Lady Hewley's* case (2) in its various stages, are excluded from this case, because this is a charity of a totally different character to those. So also, in my opinion, must be the case which Mr. *Cotton* referred to, namely, the *Scarborough Church Case*. There the sole object of the trust was to keep the parish church in repair. It does appear to me perfectly right that when that is the sole object, none but members of the Church of *England* should be trustees, because members of the Church of *England*, who would have an affection for their own church, would take care it was kept in repair; while, if you elect Protestant Dissenters, they might be of a moderate class, or those who are less

(1) 3 Mer. 353. (2) 9 Cl. & F. 355.

V.-C. M. 1876 ATTORNEY-GENERAL v. ST. JOHN'S HOSPITAL, BATH. Judgment.

moderate Dissenters. Many of them love and venerate the Church of *England*; other classes of Protestant Dissenters strongly dislike it. I have seen a great deal of all those classes, and I know how friendly some of them are, and how bitterly hostile others are. Therefore I do not admit the principle that Protestant Dissenters are to be trustees of a charity whose sole object is to keep a parish church in repair. I entirely concur in the propriety of the decision arrived at in that case, that none but members of the Church of *England* could properly be trustees of such a charity. But in this scheme it is deliberately proposed by the Attorney-General himself that the objects of the charity may be Dissenters of any description whatsoever, provided they are persons of good and orderly lives, and in other respects qualified; and, as far as I can see, even Roman Catholics may be objects of the charity. There is nothing to exclude them, provided they are persons of good and orderly lives; and they not only are, but ought to be, just as much objects of the charity as if they had been members of the Church of *England*.

Of course I am aware, and I have acted upon this principle, that in all these cases of schemes for charities the suggestion of the Attorney-General is always entitled to great weight, unless the Court can see that there are strong objections to the scheme proposed by him. He, of course, submits it; it is not for his decision; it is for the decision of the Court; my decision in the first instance, and the Court of Appeal, if necessary. Accordingly, I attach great weight to his suggestion. But then I must look at what is the object of the charity, and what is the necessity for this restriction. The case of the *Ilminster School*, *Baker* v. *Lee* (1), has been referred to in the argument; and it is a remarkable case, because it was a charity for a school at *Ilminster*, where the object was to educate children in the tenets of the Church of *England*, and no others; *ultra* that, there was a trust for repairing roads, so that it was a mixed object. The question about the governing body came before the Master of the Rolls, Lord *Romilly*, who decided that, inasmuch as it was a mixed object, there was no necessity for the trustees being exclusively members of the Church of *England*. That went before the Lords Justices *Knight Bruce*

(1) 8 H. L. C. 495.

and *Turner*, who differed from the Master of the Rolls, and decided that, inasmuch as the primary object of the charity was the religious education in the school, and that the repairing of the roads, and so forth, was entirely a subsidiary object, the primary object ought to govern, and, therefore, that the trustees must be exclusively members of the Church of *England*. That was taken to the House of Lords, and when it got there the case was heard by four learned lords, the Lord Chancellor (Lord *Westbury*), Lord *Cranworth*, Lord *Chelmsford*, and Lord *Wensleydale*, three of whom had been Lord High Chancellors, and the other a Judge of very great eminence, Lord *Wensleydale*. It certainly is remarkable that this point was then considered so doubtful as to the mixed fund, that the four learned lords were equally divided; two were of opinion, with the Lords Justices, that the trustees ought to be exclusively members of the Church of *England*, and two thought there was no such necessity. Being equally divided, the necessary consequence followed, that the decision of the Lords Justices was confirmed, and that with regard to that charity the trustees must be exclusively members of the Church of *England;* but as I am, to the best of my powers, bound to apply the principles which ought to govern the case, I confess I refer with great satisfaction to the decision of Lord *Cranworth*, who was, in my opinion, one of the ablest Judges we have ever had in Chancery. Lord *Cranworth* lays down the rules which, I think, are entirely applicable to this case (1): "Whenever the Court of Chancery is called on to appoint trustees of a charity, its duty obviously is to select those who are likely best to discharge the duties imposed on them by the trust, and where the trust is confined to the duty of selecting proper persons to teach or expound the doctrines of the Church of *England*, or to instruct children in any branches of learning of which the tenets and doctrine of the Church of *England* are necessarily to form part, and to apply funds for the promotion of that object, it can hardly be doubted that in the exercise of a sound discretion the Court will take care that none but members of the Church of *England* shall be appointed trustees. They will, *primâ facie*, be the persons best qualified to judge of the fitness of those who are to be called on to give the necessary instructions." His Lordship, after saying

(1) 8 H. L. C. 513.

V.-C. M. 1876 ATTORNEY-GENERAL v. ST. JOHN'S HOSPITAL, BATH. Judgment.

that the same principle should be applied where the charity is connected with any other religious tenets, continues:—"But where the trust embraces other objects besides those connected in the manner I have mentioned with the Church of *England*, or with any religious sect or class dissenting from the Church of *England*, then the principle on which the Court proceeds in selecting as trustees none but members of the Church of *England*, or of the religious sect or denomination whose principle it is the subject of the trust to enforce is no longer applicable." Therefore, I think, on every principle I am bound to look to the objects of this charity to see how it is likely to be administered to the satisfaction of those for whose benefit it exists.

Now, I take it this is a charity which has been founded, and which would exist for the benefit of the inhabitants of the city of *Bath* and its neighbourhood, from whom, as I understand, all the objects of this charity must be selected. The Legislature has provided that certain property, where it is corporation property exclusively, shall be managed by the corporation itself, and where it is not exclusively belonging to the corporation, then a body of trustees are to be selected under 5 & 6 Will. 4, who are to be the charity trustees. Accordingly, Lord *Truro* decided, in 1851, in the case of the *St. John's Hospital* (1), that the very property belonging to this charity was not property belonging to the corporation, and, therefore, he appointed as trustees of it the trustees of the municipal property. That body has ever since consisted of a mixed body of persons, partly members of the Church of *England*, and partly Protestant Dissenters. What is the feeling in *Bath* with regard to this body? I have an affidavit, to which I confess I cannot, as Mr. *Cotton* desires I should do, pay no regard; on the contrary, I think it is entitled to very considerable attention and respect. Mr. *E. T. Payne*, of the city of *Bath*, says: "I am the solicitor for the trustees of the patronage of the *Hospital of St. John the Baptist*, the Defendants in this suit. For the last twelve years I have been secretary or clerk and solicitor to the Board of Trustees of the Municipal Charities of the city of *Bath*, the body to whom it is proposed by the present scheme to intrust the administration of the charity of the *Hospital of St. John the Baptist*.

(1) 3 Mac. & G. 235.

During that time the trustees have worked harmoniously and pleasantly, with no more diversity of opinion than is usual amongst men of business and intelligence acting in a common object. On many occasions during the period I have held office the trustees have considered the future administration of the trusts of the charity, and have all earnestly desired to see them established upon a sound footing for the benefit of the classes for whom it was intended. In the month of April, 1874, the trustees received, by the favour of Her Majesty's Attorney-General, a copy of the scheme which he proposed to submit to this honourable Court for the administration of the trusts of the charity. They found that the charity was one so far identified with the Church of *England* that Her Majesty's Attorney-General considered it proper that the trustees should all declare themselves to be members of the Church of *England* as a qualification for acting. The trustees consider this qualification to be obnoxious, and firmly object to it, and on divers occasions have communicated to Her Majesty's Attorney-General and his solicitor their objection to the clause, and their desire that inasmuch as the benefits of the charity were to be enjoyed by persons of all creeds and without religious qualification, no such declaration should be required from the trustees as distributors or almoners thereof only." Now comes this very material circumstance:—"On the 28th of May, 1874, it was moved by *R. King*, seconded by Mr. *R. D. Commans*, and unanimously resolved, that in the opinion of this meeting of trustees of the municipal charities of *Bath* the religious qualification defined in the first clause of the scheme should be omitted. The said *R. King* and *R. D. Commans*, the trustees who moved and seconded the resolution mentioned in the last paragraph of this affidavit, are both members of the Church of *England*." Therefore, I have here moved and seconded by two members of the Church of *England* a proposition that their co-trustees who might be Protestant Dissenters should not be excluded, and which was carried unanimously. "On the 10th day of December, 1874, it was moved by Mr. *G. Mayer*, and seconded by the said *R. King*, and unanimously resolved, that the clerk should write to the solicitor of the Attorney-General again urging the objection of the board to the religious qualification required." Again moved and seconded by two mem-

V.-C. M. 1876 ATTORNEY-GENERAL v. ST. JOHN'S HOSPITAL, BATH. Judgment.

bers of the Church of *England*. That is not all. "A public meeting was held to consider the scheme, and it was then again unanimously resolved that the religious qualification was objectionable. I have mixed largely with persons of all religious and political opinions, and I have found but one expression, viz., that it was desirable that no religious qualification should be required of the trustees. There are now thirteen trustees of the municipal charities of the city of *Bath*, and of these ten are members of the Church of *England*." The three of course, the remainder, are Protestant Dissenters. They work harmoniously; I see no reason to doubt whatever that they will work harmoniously in future. I think, therefore, I must decide according to the authorities which I have already mentioned.

The *Ilminster School Case* (1) must be considered to decide that the qualification of trustees will depend upon the main objects of the charity. I am bound to say I cannot consider that case as an authority so high as it would have been if the decision had been confirmed unanimously by the Lords, or if there had been a majority of the Lords confirming it. However, there it stands as a decision that the paramount object of the charity regulated who the trustees should be. The principal and paramount object here is merely eleemosynary; I have no doubt whatever it will prove to be the case that the trustees of these charities at *Bath* will consist, as these bodies usually do, of the principal inhabitants, gentlemen residing at *Bath*, respectable tradesmen and merchants, and though there may be some Protestant Dissenters among them, I am sure they will faithfully and properly administer the trusts of such a charity as this. Now, that I confess is the conclusion in this case which I should have arrived at if I had no authority to guide me. Bearing in mind, as I have said, that the principal and paramount object of the trust is to regulate who are to be selected as the governors or managers of it, the decision of the Master of the Rolls, Lord *Romilly*, in the case of the *Attorney-General* v. *Calvert* (2), is one in which I entirely agree and which I intend to follow. There he came to the conclusion that the charity was an eleemosynary foundation altogether. There was no qualification or religious opinion to be entertained, and the

(1) 8 H. L. C. 495. (2) 23 Beav. 248.

persons who were to be selected were not, as in the present case, necessarily to be of a particular religious class. Then he lays down the rule in a manner to which I entirely subscribe. He says (1), "When the charity in question is one of a purely eleemosynary character a wholly different class of considerations arise. No doctrine of law, no precept of religion, establishes that the act of relieving a fellow-creature from the privations or calamities which have befallen him ought to be preceded by ascertaining that he holds opinions in accordance with the true doctrine of Christ as promulgated in the Gospel, or with those which the donor believes to be such. The duty of relieving his fellow-creature in distress is imposed on the Christian irrespective of religious doctrines and tenets." Then he says, "The rule of this Court is to carry the will of the founder into effect." Therefore he entirely adheres to the doctrine of the *Attorney-General* v. *Pearson* (2) and *Lady Hewley's* case (3), and he concludes: "In eleemosynary charities the religious opinions and tenets of the founder are wholly to be disregarded, and are to be treated as forming no indication of his intention on which this Court can act. The presumption is that he included all, and the burden of proof lies on those who seek to exclude." In a later case of the *Attorney-General* v. *Clifton* (4) he found that the objects of the charity were necessarily persons holding particular religious tenets, therefore although he adhered to the rule which he had laid down in *Attorney-General* v. *Calvert* (5), it was inapplicable to that case, because there were reasons which existed in the *Attorney-General* v. *Pearson* and the other cases which did not exist there.

Now, what I have to decide here comes to this: there are only two objects in this charity in any way connected with religious doctrines, first, the selection of a master whose qualification is so defined that there can be no miscarriage, because he must be a clergyman of the Church of *England* in priest's orders, and whether the trustees are Protestant Dissenters or whether they are members of the Church of *England*, such is the person whom alone they can select. That, therefore, does not, in my opinion, require that Pro-

(1) 23 Beav. 257. 3 Jur N.S. 502.
(2) 7 Sim. 290.
(3) 9 Cl. & F. 355.
(4) 32 Beav. 596. 9 Jur N.S. 999
(5) 23 Beav. 248. 3 Jur N.S. 500

V.-C. M. 1876 ATTORNEY-GENERAL v. ST. JOHN'S HOSPITAL, BATH. Judgment.

testant Dissenters should be excluded from the governing body. The only other object is keeping the chapel in repair, and am I to come to the conclusion that in a body of twelve or fifteen trustees, of whom a third or fourth are Protestant Dissenters probably, that they will so disregard their duty as to allow the chapel to go into decay when funds are devoted to it, and when there is a plain duty to be performed. Beyond those two objects there is no duty but that of distributing the charity funds among a certain number of poor persons, therefore the primary and paramount object of this charity is eleemosynary, and it being so, I can see no ground whatever why Protestant Dissenters having the qualification which these trustees must have should be excluded.

I therefore, entirely to my own satisfaction at all events, come to the conclusion that there is no occasion whatever for introducing this restriction, which I am satisfied would be most unpalatable to the inhabitants of the district who are to have the benefit of the charity, and which would be the cause of dissensions, which would be avoided by letting the body be elected as it has been. I therefore come to the conclusion that those words which require that the trustees must be members of the Church of *England* must be expunged from the scheme.

The order will be to refer the matter back to Chambers, with a declaration of the opinion of the Court that the trustees to be appointed under the scheme need not be exclusively members of the Church of *England*. The costs of the Attorney-General and of the Defendants must be provided for out of the funds of the charity, but this will not include the costs of Mr. *Davey's* clients who have undertaken not to ask for their costs.

Solicitor for Attorney-General: *Clabon.*
Solicitor for Defendants: *G. F. Cooke.*

In re LISBON STEAM TRAMWAYS COMPANY.

V.-C. M.

1876

March 30.

Winding-up—Special Examiner—Companies Act, 1862, *s.* 115—*Compulsory attendance of Witnesses.*

Held, that a witness having been ordered to attend and give evidence before a special examiner appointed with his consent, under the *Companies Act*, 1862, s. 115, and having attended several times in pursuance of such order, could not refuse to continue giving his evidence on the ground that his deposition might be used against him in a pending action commenced before the appointment of the special examiner.

9 Ch D 168

Statement.

THE *Lisbon Steam Tramways Company* was formed for the construction of tramways in the neighbourhood of *Lisbon*, and having completely failed in the undertaking, the company was now being wound up under an order dated the 16th of July, 1875.

In the course of the winding-up, it was considered necessary by the official liquidator that Mr. *Albert Grant*, who had taken an active part in bringing out this company, should be examined as a witness, and by his consent a special examiner was appointed to take the evidence.

An order was made on the 16th of December, 1875, under the 115th section of the *Companies Act*, 1862, for the examination of Mr. *Albert Grant*, as a person capable of giving information concerning the trade dealings, estate, and effects of the company.

Mr. *Grant* had attended for examination on five occasions, and his evidence up to that time, given in the presence of his own counsel and solicitor, had been signed by him, and with his consent had been filed by the special examiner. Three subsequent appointments had been made for the continuation of the evidence, but on all these occasions Mr. *Grant* failed to attend for examination, the reasons given by him being ill health and pressure of business. Mr. *Grant* now refused to attend any further appointments for examination, on the ground that numerous actions had been brought against him by shareholders in this company, in all of which Mr. *Beddall* acted as the solicitor, while he was at the same time solicitor for the official liquidator, and that in one of these actions, namely, *Twycross* v. *Grant*, which was shortly coming on for trial, the evidence he had already given before the special

V.-C. M. 1876

In re LISBON STEAM TRAMWAYS COMPANY.

examiner had been supplied to the opposing counsel, and formed part of their briefs.

Statement.

A motion was now made on behalf of the official liquidator, under the 115th section of the *Companies Act*, 1862, that Mr. *Grant* might be apprehended and brought before the special examiner to answer such questions as might be put to him; or that if the Court should think fit, he might be ordered to attend at such time and place as should be appointed by the special examiner for that purpose.

There was a cross motion on behalf of Mr. *Grant*, that the examination should not be continued until after the trial of the action of *Twycross* v. *Grant*, now pending.

An application on behalf of Mr. *Grant* that the hearing of these motions might be postponed for the filing of further affidavits was refused.

Argument.

Cookson, Q.C., and *Romer*, in support of the motion:—

The Court having made an order for Mr. *Grant* to attend and be examined, and a special examiner having been appointed with his consent, he cannot now refuse, when he finds his examination likely to be injurious to him, to conclude his evidence. The Court will not allow its order to be set at defiance. The reason why the evidence already given by Mr. *Grant* has been filed, is that it was intended to be used in aid of an action against one of the directors, who has since compromised with the official liquidator. That action has consequently been discontinued, but if Mr. *Grant* has spoken the truth in the evidence he has given, there is no reason why it should not be known by every one, and he cannot complain of such evidence being made use of in unravelling the scheme by which the shareholders have lost a very considerable sum of money. It appears that no less than £300,000 have been expended in connection with this project of laying down steam tramways in *Lisbon*, and nearly all of it has been lost. It is supposed that the property would realize between £20,000 and £25,000, but a claim has been put in by the shareholders in *Portugal* to the greater portion of this money, and it is probable that there will not be more than about £8000 for distribution among the English shareholders.

We do not ask for the committal of Mr. *Grant* unless he should refuse to obey an order of the Court to attend to be examined. The alternative of the motion will otherwise be sufficient.

Glasse, Q.C., *Higgins*, Q.C., and *Everitt*, for *Albert Grant*:—

The Court has no power to order any witness to be apprehended and brought before a special examiner to give evidence: *In re Smith, Knight, & Co.* (1). If the Court has no power to order the apprehension of a witness, it cannot compel his attendance. Mr. *Grant* only consented to attend as a witness upon certain terms, which were that his convenience should be consulted, and, as his occupations are very onerous, and his business of a most extensive description, he cannot always find leisure to attend. His consent to give evidence was limited by these considerations, and without his consent he cannot be made to attend.

The principal ground upon which Mr. *Grant* declines to continue his evidence is that, the depositions having been delivered out by the special examiner, they have been handed over as instructions to counsel, to be used against him in an action now pending by a Mr. *Twycross*. This conduct cannot be justified, and it was held in *Venables* v. *Schweitzer* (2) that a witness giving evidence before a special examiner may decline to answer any questions tending to shew his liability in a pending action commenced against him. The evidence given ought to be sacred, and no one has a right to know it but the Court. Mr. *Grant* was examined upon five different occasions, when he answered all the questions put to him; but when he found that the evidence was continued for the mere purpose of being used in the action commenced against him, then he declined to submit to any further examination. Mr. *Beddall*, the solicitor for the official liquidator, who conducted the examination before the special examiner, is also the solicitor in the action against Mr. *Grant*. We say, therefore, that the motion ought to be dismissed with costs: first, because it is not within the power of the Court to make the order asked for; secondly, because Mr. *Grant* never objected to be examined, so long as the examination was kept within proper limits; and, thirdly, because the motion has been forced on without our having

(1) Law Rep. 8 Eq. 23. (2) Law Rep. 16 Eq. 76.

V.-C. M. 1876 *In re* Lisbon Steam Tramways Company. Argument.

time to answer the affidavits; and in such a penal clause as this, every opportunity should be given for the person accused to prepare his defence.

Cookson, in reply:—

[Malins, V.C.:—What I wish you to address yourself to is the necessity of proceeding with the examination before the trial of the action.]

If Mr. *Grant* would now undertake to produce certain accounts referred to in letters written by him relating to the affairs of this company, we would consent to the examination standing over: but this offer has been declined. The question is whether, when the examination has been carried on up to a certain point, the witness may break off, and refuse to obey any further the order of the Court. If he has nothing to conceal, why should he refuse to give us the information we require? It has been called a penal act; but it is not penal to make an honest man speak the truth. If this examination is further postponed, it will endanger the safety of the small amount of assets which the liquidator may have a chance of recovering. There is now an offer for the purchase of the property, and there is no time to be lost in taking proceedings. The action will not be tried within a short period, and delay is of vital importance. The Legislature has provided the Court with powers by the 115th section to meet such cases as these, and to refuse this motion would be to repeal that section.

Judgment.

Malins, V.C.:—

This is an application in the winding-up of the *Lisbon Steam Tramways Company*. Two petitions were presented in this branch of the Court in the early part of the year 1875, one by a body of persons connected with the company, and one by Mr. *James Twycross*. After long protraction, in consequence of examinations going on before a special examiner, these petitions were postponed from time to time from the month of January until the 16th of July, when I made the order to wind up the company. That winding-up has been proceeding in my Chambers ever since. I had a very angry discussion before me yesterday in Chambers on the affairs of the company, and it then appeared, as it had

appeared previously, though not so distinctly, that the affairs of the company are of the most disastrous character.

It seems that the company having been promoted by—I do not know whether I must call Mr. *Albert Grant* and the persons who are associated with him promoters or not—but at all events, it having been patronized by Mr. *A. Grant* and the contractors, and various noblemen and gentlemen whose names appear on the face of the prospectus, this company was launched, and spent about £300,000 for making tramways in the neighbourhood of *Lisbon*, to be worked by a particular kind of locomotive engine. The result is a total failure; and from what I heard yesterday I believe I am right in stating that there will certainly not be forthcoming more than £20,000 or £25,000 for all the shareholders, and a very large part of that is claimed by the Portuguese Government, who will never allow it to leave *Portugal* and come to *England*, so that probably there will only be between £10,000 and £15,000 to be found for the English shareholders as the result of this company, which has been launched, as I understand, and conducted, certainly, if not as a promoter, very greatly under the patronage of Mr. *Albert Grant*.

This is a very miserable result, and it strikes one that everyone concerned in such a business ought to be summoned to give an account of themselves in the fullest manner that the law will permit. Having made this order in July last, the next duty that fell on me was to appoint a liquidator, and about a week or ten days after, I had the usual contest in my Chambers as to who should be the official liquidator, the result of which was that I came to the conclusion it would be better I should not take the nominee of any one set of parties, and I selected Mr. *Whinney*, an accountant of high character, in whom, from my personal experience, I had great confidence, believing that he would conduct the winding-up in a business-like manner, without any unnecessary litigation, and he has done so up to this time. The winding-up has been one of a very embarrassing character, and I believe at one time the official liquidator had to apply to the Portuguese Government, and to send a gentleman—one of his partners—over to *Portugal* to protect the property of the company there, such as it was.

V.-C. M. 1876 *In re* Lisbon Steam Tramways Company. Judgment.

In the course of this business the shareholders found themselves aggrieved, and it is no wonder; for I find parties here who have subscribed on the faith of the representations of noblemen and gentlemen who have put their names to this prospectus; they are persons of the highest position who have given the use of their names, and it turns out that they have done so for bribes. The name of one gentleman has been handed up to me by the official liquidator to-day; and it is stated that having given the use of his name, which was an attractive name, he actually received £1000 for it, and the result of his cross-examination has been that, I suppose for very shame, he has paid back the money which he so received. I am told there are others in the same situation. It is no wonder that the shareholders, finding themselves thus treated, and having had this money extracted from their pockets, should feel strongly upon the subject. I suggested to Mr. *Twycross* yesterday that it would be as well for him to go home and write off that £700 which he has paid for his shares as a bad debt, and have done with it; but he said, "No; I have been so treated—I consider the conduct of people engaged in this company has been such, that I will bring them to book if I can." I cannot say that I am surprised at every shareholder in the company, under the circumstances, feeling himself justified in bringing an action, though I am unable to see it was necessary to bring so many as ninety-six actions, when all might have waited the result of one. It is considered right by the shareholders to proceed against the greatest offender in this transaction—for that there has been some great offender, or some great offenders, can admit of no shadow of doubt—and they have selected the man they consider the greatest offender, namely, Mr. *Albert Grant*, whom they charge with having pocketed a large amount of the money obtained from these shareholders. They have selected him to bring an action against, and to try whether they have or have not been ill-treated, which is a right they are perfectly at liberty to exercise. Mr. *Grant*, in that action, if the claim made against him is wrong, will have the fullest opportunity of defending himself. He will, according to the constitution of the Courts, have to make such discovery in that action as the rules of the Court oblige him to make. But the action which is going to trial, namely, Mr. *Twycross's* action, was

commenced so long ago as the 7th of June last; the declaration was in July, and issue joined in November. Now, under these circumstances, the Plaintiff in the action being one person, and the official liquidator a totally different person, on the whole I think it a little inconvenient that the official liquidator and the Plaintiff in that action should be represented by the same solicitor. I had rather they had been different solicitors; but, however, the shareholders, I suppose, thought the official liquidator's solicitor knew more about this, had greater information, and was more likely to protect their interests, and I cannot see that they were not at liberty to go to that solicitor as well as any other in the profession. I cannot, therefore, look upon that as an objection to the application which is now made.

In the winding-up of companies, fortunately for the public, this Court is armed with very extensive powers, and some of those powers are contained in the 115th section of the Act of 1862, which is this: "The Court may, after it has made an order for winding up the company, summon before it any officer of the company or person known or suspected of having in his possession any of the estate or effects of the company"—That is not suggested with regard to Mr. *Grant*—"or supposed to be indebted to the company"—That is not the case here—"or any person whom the Court may deem capable of giving information"—which is the case here—"concerning the estate, trade dealings, or effects of the company, and the Court may require any such officer or person to produce any books, papers, deeds, writings, or other documents in his custody or power relating to the company, and if any person after being tendered a reasonable sum for his expenses, refuses to come before the Court at the time appointed, having no lawful impediments (made known to the Court at the time of its sitting, and allowed by it) the Court may cause such persons to be apprehended and brought before the Court for examination." The official liquidator, in the simple discharge of his duty, conceived that Mr. *Grant* was a person who could give the information pointed out by this section. He therefore applied to the Court that Mr. *Grant* might be summoned to give this information.

For this purpose the parties agreed that a special examiner should be appointed. Mr. *Grant* as much agreed to that as the

V.-C. M. 1876 *In re* Lisbon Steam Tramways Company. Judgment.

official liquidator, and Mr. *Grant* having agreed that a special examiner should be appointed, my view of the case is, that when the special examiner is appointed with the consent of the parties, the place appointed by him, be it his own chambers, or the Law Institution, or any other place, becomes for that purpose part of the Court, and the person so consenting is as much bound to attend the appointment of the special examiner as he would be to attend the appointment of the Court itself. But Mr. *Higgins* cited *In re Smith, Knight, & Co.* (1), decided by the Master of the Rolls. Now, the case before me is one on which Mr. *Grant* has agreed to the appointment of the special examiner, while there the whole decision was, that the person against whom the application was made had not consented to the appointment of the special examiner, and the note is this: "A special examiner ought only to be appointed after all persons interested in the appointment have been heard thereon. Where, therefore, a special examiner was appointed to take the examination and cross-examination of witnesses in the winding-up of a company, Held, that a person who had given evidence in opposition to a summons to place him on the list of contributories, and who had not consented to the appointment of the special examiner, could not be required to attend and be examined before him." To that it was argued, because a man who had not consented to a special examiner could not be obliged to attend, therefore a man who has consented cannot be obliged to attend either. It is perfectly clear, in my opinion, that a man who has consented to the appointment of a special examiner is as much bound to attend the special examiner as he would be to attend the Court itself. Accordingly, Mr. *Owen* having been selected as the special examiner, and five appointments having been made, they were attended by Mr. *Grant*, and on those occasions, in the presence of his own solicitor and his own counsel, he was examined. He gave, as it appears, very valuable information. When he had had five days' examination, of two or three hours each time—and I confess I should have thought five days would have been enough to go through the whole of it—for some reason or other it was found expedient that he should sign his deposition, so far as it had gone, and he did so; and the

(1) Law Rep. 8 Eq. 23.

deposition, as I collect from what has passed before me, was handed out with a view to proceeding against one of the directors of the company who has not rendered proceedings necessary because he was settled with without proceedings being taken. Since that time Mr. *Grant* has failed to attend. I have Mr. *Owen's* certificate here, in which it appears that Mr. *Grant*, twice on one day—the appointment having been made by consent of his own agents—failed to attend. Mr. *Glasse* has told me, and I am willing to believe the accuracy of what he said, that there was no intention whatever to treat the Court or the special examiner with disrespect. At the same time I do say it is most unwarrantable of any man, especially a man of business and a banker, to make these sort of appointments with the Court, and then, simply because it does not suit his convenience, to make default, and to leave the special examiner sitting there to wait his will and pleasure. Therefore I think they did quite right in exacting from Mr. *Grant*, on one occasion, the payment of the costs of the day. Then another appointment was made, as I collect, with the approbation of his advisers, on the 21st of March, and he again made default. Excuses were made for him by his solicitor, on the ground that he was overwhelmed with business; but that is not the ground on which this application is made.

Mr. *Grant* now sets up this case, that, inasmuch as he is Defendant in this action, in which Mr. *Twycross* is Plaintiff, and Mr. *Beddall*, the solicitor of the official liquidator, is solicitor for Mr. *Twycross*, he ought not to be examined now, because the result of that examination will be used against him in the action. Now, considering Mr. *Twycross's* action was brought in June, that the parties were at issue in November, and that Mr. *Grant's* examination before Mr. *Owen* did not commence until the year 1876, it is very remarkable that he should not have set up this defence at an earlier period; that he did not at once say, "Mr. *Beddall*, who is the attorney in the action brought against me by Mr. *Twycross*, is also solicitor to the official liquidator, and he (I can see very plainly) will use anything I say against me in the action, and I shall apply to the Court for protection in that action against anything that can possibly be used against me." I understand that he was examined on the five different occasions by Mr. *Beddall*, who conducted the ex-

V.-C. M. 1876 *In re* LISBON STEAM TRAMWAYS COMPANY. Judgment.

amination himself, with a full knowledge on the part of Mr. *Grant* of the position which he occupied as the solicitor against him in the action, and as solicitor also to the official liquidator. No objection whatever was taken on that ground; but, knowing that the action was then at issue, and that it stood for trial, all of a sudden the idea came across him that what he said in these proceedings might be used against him in the action. I think it was then too late to take that objection, and that he waived it by submitting to the examination by Mr. *Beddall*, and I am afraid it was because the examination had become so exceedingly disagreeable to Mr. *Grant* that he desired to avoid the continuance of it. If Mr. *Grant*, in his connection with this company, has been, as I hope it will turn out he has been, straightforward and honest in his dealings, of course he has nothing whatever to conceal; but if he is afraid of anything which he wishes to conceal, here is the Act of Parliament which gives me the power to require him to give information. I am by no means certain, if I put it off now, that I shall be assured of the period at which it will be given; but the action, from what I hear, will not be tried until the middle of May. Meanwhile, it is brought before my attention that the affairs are in such a state as imperatively to demand that at the earliest possible moment the most rigid investigation should be made; and, as Mr. *Grant* is satisfied to give the information, and has actually commenced giving it, my opinion is that he must go on with it, and that he must answer all the questions which are put to him. The only suggestion that made much impression on my mind was this: It is sworn in the affidavit that the information obtained from him was submitted to the counsel in the action, and that it was made part of their briefs. That is said upon one side, and I do not understand that it is denied on the other. It may be, although I cannot enter into that question, that Mr. *Grant* is honest, and a person who would really tell the truth, but if he has been guilty of transactions such as those which have been alleged in the business of the company, if he has been one of the principal promoters, and one of the main instruments in inducing the public to put their money into it, I can only say I hope the result of the case, be it proved against him, or be it proved against anybody else, will be to compel those persons

who have thus misled the public to bear the burden, and to relieve the unfortunate people who have been led by these misrepresentations to advance their money. My opinion, therefore, is, that the examination having commenced, must be continued.

I ought to mention this: that the notice of motion follows the words of the Act, but it is not intended to be more than an application that Mr. *Grant* should be ordered to attend. If this had been an application to commit Mr. *Grant*, or if any other penal consequences had followed than that of merely attending the examination, I certainly should have allowed him to file any affidavits he thought fit to oppose the application. However, the motion merely is that he be ordered to attend the special examiner. The order will therefore be, that Mr. *Albert Grant* be ordered to attend at such time and place as shall be appointed by the special examiner for that purpose, and to be examined at his own expense. And the official liquidator will have the costs of his motion. The cross motion will be dismissed with costs—one order upon both motions.

Glasse then asked that the Court would intimate to the official liquidator not to obtain any appointment before the special examiner for the examination of Mr. *Grant* until Mr. *Grant* had had the opportunity of taking the opinion of the Court of Appeal.

Cookson asked the Court not to accede to the application, since the only object of it was to create delay.

The VICE-CHANCELLOR refused the application.

Solicitor for Official Liquidator: *A. Beddall.*
Solicitors for *Albert Grant*: *Ashurst, Morris, & Co.*

V.-C. B.

1876

March 10

7 Ch D. 68

PATTERSON *v.* WOOLER.

[1873 P. 81.]

Practice—Judicature Act, 1873, *s.* 22—*Pending Cause—Mode of taking Evidence—Refusal by Party to have Evidence taken by Affidavit—Costs of Opposition ordered to be paid by refusing Party—Rules of Court*, 1875, *Order* XXXVII., *r.* 1.

Evidence in a cause pending on the 2nd of November having been taken by affidavit, but the affidavits not having been filed before the rule as to pending causes was laid down by the Judges, and the cause having been ordered to proceed under the new practice, a motion was made on behalf of the Plaintiff that the evidence might be taken by affidavit. One of the Defendants, a trustee, opposed the motion. The motion was refused, and the costs were reserved, but ultimately were ordered to be paid by the trustee.

Statement.

TRIAL OF CAUSE.

The bill was filed originally on the 1st of May, 1873, and by amendment on the 5th of February, 1874, by *Frederick Henry Patterson*, an appointee under an appointment made by his mother, a widow, under a power in her late husband, the Plaintiff's father's, will, against the trustees of the will and others, to have the share raised and paid. The trustees resisted, and by their answer, filed on the 29th of July, 1873, submitted that the alleged appointment was a fraud on the power.

The bill having been amended, and replication not having been filed nor notice of motion given before the 2nd of November, 1875, a motion was, on the 2nd of December (that is to say, after the rule as to procedure in pending suits had been laid down by the Judges), made on behalf of the Plaintiff, that the evidence might be taken by affidavit, with liberty to cross-examine in Court; on the ground that though the affidavits were not sworn till after the above-mentioned rule was laid down, the greater part of the cost of preparing them had been incurred before the statute came into operation. The motion was opposed by the trustees, and the Vice-Chancellor (*Malins*) said that the rule as to procedure in pending suits must prevail unless sufficient cause to the contrary were shewn, and sufficient cause had not been shewn. That being so, it followed that, without the consent of the Defendants to have the evidence taken by affidavit, the evidence must be taken *vivâ*

voce. His Lordship, however, reserved the costs of the motion till the hearing, in order to see whether the Defendants were justified in refusing to assent to the motion. See the report (1).

The cause now came on for trial.

Kay, Q.C., and *Dundas Gardiner*, for the Plaintiff.

Sir *H. Jackson*, Q.C., and *Crossley*, for the Defendants, the trustees.

Freeling, for infant Defendants.

Judgment.

Bacon, V.C., on the question at issue in the cause, decided that the appointment was good, and made a decree declaring accordingly, and ordering the raising of the appointed share, and payment to the Plaintiff as prayed.

His Lordship gave the trustees the general costs of the suit, but disallowed them the costs of an answer, which the Court found to have been needlessly and improperly long.

On the question of the reserved costs, His Lordship said:—

Then as to the costs of the motion. I hope I shall never be tempted, under any provocation, to act against the express enactments of the statute, or to deprive anybody of any right which the statute may have conferred upon him. Although the statute provides, as Mr. *Crossley* has mentioned, a right to have certain evidence taken in a certain way, I apprehend that the Court at all times has jurisdiction over the proceedings in every suit, and when an application is made that an easier, cheaper, and more familiar mode of taking evidence shall be adopted, and the Court finds that that is resisted on the strength of the Act of Parliament by a trustee, upon whom the duty of arguing the case is not thrown, in the presence of the *cestuis que trust* who are interested in arguing it, and who desire that an unnecessary burden in the shape of costs shall not be cast upon the estate, then, with full regard to the Act of Parliament, with no desire to go beyond it, or to go contrary to it, I have no doubt that the Court has full power, upon such a motion, to direct that the party who perversely, unreasonably, and unjustly refuses to consent to the course

(1) 1 Ch. D. 464.

V.-C. B. 1876 PATTERSON v. WOOLER. Judgment.

pointed out, shall pay the costs of the motion. Vice-Chancellor *Malins*, having the matter before him, reserved the order for the payment of costs until the result should be seen. What is the result? The trustees have obstinately and unjustly declined to avail themselves of the opportunity which the statute gave them. They relinquished, indeed, their right here, but they refused to relinquish it before the Vice-Chancellor. What is the result? Clearly, according to their own confession, they ought to have agreed, but they did not agree, and their refusal cannot be justified or accounted for on any reasonable pretext.

To complete the order which the Vice-Chancellor left unfinished, I feel myself bound to require the trustees to pay the costs of the motion.

Solicitors for Plaintiffs: *Le Blanc, Torr, & Taylor.*
Solicitors for Defendants: *Wooler; J. Wheelock.*

V.-C. B. 1876 *March* 30.

LASCELLES *v.* BUTT.

[1874 L. 76.]

Practice—Pending Cause—Judicature Act, 1873, *s.* 57—*Official Referees—Rules of Court*, 1875, *Order* XXXVI., *rr.* 2, 5.

7 Ch D 392
5 Q B D 429
430

Plaintiff, a landowner, filed a bill against an adjoining owner of land, praying for a declaration that the boundary between the two properties was marked out and prescribed as appeared in a plan annexed to the bill. Replication having been filed before the 2nd of November, 1875, the Plaintiff, on the 17th of November, obtained an order that the evidence at the hearing should be taken *vivâ voce*. On the 9th of December he served the Defendant with notice of trial, and on the 8th of February, 1876, he took out a summons to shew cause why the trial should not be referred to one of the official referees of the Court (naming one of the referees).

Semble, the Plaintiff having obtained an order under the new procedure as to the mode in which the evidence to be used at the trial should be taken, was not at liberty to change his mode of proceeding.

Held, moreover, as the application was not made within four days after notice of trial, and as there had not been an application for extension of time, that the summons was irregular, and must be dismissed.

Statement.

ADJOURNED SUMMONS.

The bill was filed on the 22nd of May, 1874, by *Francis Henry Lascelles*, of *Mayfield, Frensham, Surrey*, Esq., against *James Butt*,

a farm labourer and bailiff, and owner of a two-acre plot of ground adjoining the Plaintiff's landed estate, stating that by the indenture under which the plot of ground in question was conveyed to the Defendant, he, the Defendant, was under a covenant to put up a fence on the side of the plot of ground on which it abutted on the Plaintiff's land; and praying that the Defendant might be ordered forthwith to put up, and to maintain and preserve, a sufficient boundary fence along the side of his land where it abutted upon the land of the Plaintiff; also for a declaration that the boundary between the lands of the Plaintiff and Defendant was "marked out and prescribed by the line of stones laid down in the manner in this bill appearing." Annexed to the bill was a plan.

The Defendant by his answer, filed the 22nd of August, 1874, denied that he was under any agreement or covenant to make such a fence as in the bill mentioned, and when in answer to a summons to produce documents the purchase-deed was produced, it was found not to contain any such covenant.

The bill was then, on the 5th of February, 1875, amended, and as amended omitted all reference to the alleged covenant, and prayed that "a sufficient boundary fence . . . may be forthwith ordered to be put up, and to be kept, maintained, and preserved at all times at the joint expense of the Plaintiff and Defendant;" and as to the boundary, as before.

Defendant, by a voluntary answer, filed on the 25th of March, 1875, submitted that, even in the new form of litigation, the Plaintiff was not entitled to any relief. The Plaintiff and he were two independent proprietors holding lands under legal titles. Defendant knew the boundary of his own land perfectly well, and the entire litigation had been occasioned by the Plaintiff's attempts to dispossess him of his rights on frivolous pretences.

He also alleged as follows:—"I am advised and submit that, in order to sustain a suit to ascertain boundaries, the Plaintiff must establish a clear title to some land in my possession. And I submit and humbly insist that he has not done so, and cannot do so. There is no land of his in my possession.

"I am further advised and submit that, unless some equity is superinduced by the act of the parties, this honourable Court has

V.-C. B. 1876 LASCELLES v. BUTT.

no jurisdiction to settle boundaries, and will not interfere between two independent proprietors to force either to have his right so determined. And I submit and humbly insist that no such equity exists in the present case."

Statement.

The Plaintiff filed replication on the 14th of July, 1875, and the cause was thus one which, according to the rule of November last, was, as to procedure, to be continued according to the old practice.

On the 17th of November, 1875, upon the application of the Plaintiff, and in the presence of the Defendant, an order was made by Vice-Chancellor *Malins* at Chambers that the evidence to be given at the hearing of the cause should be taken *vivâ voce*. It was stated, but the fact was not in evidence, that the Defendant opposed this motion before the Chief Clerk, but assented to it before the Vice-Chancellor.

On the 9th of December, 1875, notice of trial, dated that day, was served by Plaintiff's solicitors upon Defendant's solicitors.

On the 8th of February, 1876, a summons was taken out on behalf of the Plaintiff, "to shew cause why, the trial of this cause having been ordered to be heard under the *Judicature Act*, the same should not be referred to *James Anderson*, Esq., one of the official referees appointed under the said Act," and that the costs of the application might be costs in the cause.

The summons was ordered for hearing on the 11th of February, on which day it was adjourned into Court by the Chief Clerk.

In support of the summons the Plaintiff deposed that it would be a great saving of time and expense to all parties if the action were tried by the official referee; so that the boundaries could be inspected and the witnesses examined on the spot.

Argument.

Swanston, Q.C., and *Crossley*, for the summons:—

This is a question of disputed boundaries—to determine which no tribunal can be so satisfactory as that of one of the official referees.

To have this reference is the Plaintiff's right under the 57th section of the *Judicature Act*, 1873; but if not, and his claim is simply discretionary with the Court, this is an exemplary case for the exercise of the Judge's discretion. The rule applying to

the case is rule 2 of Order XXXVI. of the Rules of Court, 1875, which provides that actions shall be tried in one of several different ways—one of which is "before an official referee," either with or without assessors.

The Plaintiff is always *dominus litis*, and may choose the mode of trial. In this instance there has been, pending the suit, a change of procedure, introduced by the statute; but the case of *Attorney-General* v. *Sillem* (1) shews that a new law will not take away any right from the Plaintiff. The Plaintiff's rights of action were vested before the Act passed.

If it be contended that the right of the Plaintiff to go before an official referee does not exist in the case of a suit instituted before the Act, the answer is that "the presumption against a retrospective construction has no application to enactments which affect only the procedure and practice of the Courts": *Maxwell* on the Interpretation of Statutes (2); referring to *Wright* v. *Hale* (3).

The only difference between the jurisdiction of the referees and that of the Court seems to be that theirs is not a public Court, that they cannot commit for contempt, and they cannot enforce their orders. But their office is specially designed for and adapted to local inquiries.

B. B. Rogers (*Kay*, Q.C., with him), for the Defendant:—

This is an application intended only to harass the Plaintiff. The original bill was filed on an erroneous assumption. A summons was taken out to produce documents. They were produced, and the error made manifest. Then the bill was amended, setting up a case of disputed boundary. There is really no question of boundary at issue. Then replication was filed, and the case being so far under the old practice, the Plaintiff might have had the cause tried on affidavit evidence, with leave to cross-examine. He preferred to have the trial on *vivâ voce* evidence, and moved accordingly. To this we ultimately assented. Then, on the 9th of December, he served us with notice of trial, and on the 8th of February took out this summons.

Upon the question of law, the pleading in the answer is framed

(1) 10 H. L. C. 704, 762. (2) Page 119.
(3) 6 H. & N. 227.

V.-C. B. 1876 LASCELLES v. BUTT. Argument.

on the ruling of Lord *Northington* in *Wake* v. *Conyers* (1), cited by Sir *W. Grant*, M.R., in *Speer* v. *Crawter* (2), and referred to and followed by Sir *John Leach*, M.R., in *Godfrey* v. *Littel* (3).

Apart from this, the Court has no jurisdiction to make an order on this summons. The Plaintiff is out of time. His application should, under rule 5 of Order XXXVI., have been made within four days of the service of the notice of trial, or within such extended time as a Court or Judge might have allowed. This is not a summons by the Plaintiff for extension of time.

Swanston, in reply:—

If the Defendant considered the case of the Plaintiff to be so baseless as has been represented, why did he not demur to the bill?

Since the passing of the *Judicature Act* the Court will not listen to arguments founded on antiquated rules about the limits of jurisdiction of the former Court of Chancery.

Judgment.

BACON, V.C.:—

Upon the merits of the question, if there be one, between these parties, I have no means at present of forming an opinion.

One thing, however, is plain and conclusive, and that is that the course pursued by the Plaintiff, in conducting his own case, has rendered it impossible for the Court to make an order on this application. On the 9th of December he gives notice of trial, and not until the 8th of February does he take out this summons, the order directing that he must apply, if he applies at all, within four days of the service of notice of trial, or within such extended time as the Court may allow—and this, as has been remarked, is not an application to the Court to extend the time. There is no such application as that before me.

In this case, replication having been filed before the 2nd of November, 1875, the Plaintiff obtains an order, under the new practice, to have the evidence taken *vivâ voce;* and he then, also under the new practice, serves the Defendant with notice of trial. Having done this, having selected his mode of having the cause

(1) 1 Eden, 331. (2) 2 Mer. 410, 418.
(3) 1 Russ. & My. 59, 62.

tried, I do not think he is at liberty to resort to a totally different mode of proceeding, simply because it appears that a Plaintiff has his choice, in the first instance, of a variety of modes of having his action tried.

The application is not warranted by the statute; nor do I know what right a Plaintiff has to mention the name of one of the official referees in the summons.

When it is objected that certain rules by which the Court was guided in former days have become obsolete, I do not know that those rules are not as worthy of observation as they ever were, and that the Court is not as much bound to follow them as it ever was. Certainly the question raised by those rules will have to be considered before any decision as to disputed boundaries can be arrived at by the Court.

The summons is altogether irregular and wrong, and must be dismissed with costs.

Solicitors for Plaintiff: *Tucker, New, & Langdale.*

Solicitors for Defendant: *Prior, Bigg, Church, & Adams,* agents for *Hollest & Mason, Farnham.*

V.-C. H.
1876
Jan. 31.

HERITAGE *v.* PAINE.

[1872 H. 209.]

Limited Company—Sale of Shares on Stock Exchange to Jobbers—Infant Transferee—Indemnification of Vendor by Jobbers—Winding-up—Vendor—Contributory—Agreement by Liquidator with Vendor—Effect on Jobber's Liability to indemnify.

The owner of sixty £100 shares in a company, on each of which £10 had been paid up, sold them on the *Stock Exchange* to jobbers, who furnished the name of a purchaser to whom the shares were transferred, and in whose name they were registered. The company was afterwards ordered to be wound up, when it turned out that the purchaser was an infant at the time of the transfer; and his name was thereupon removed from the list of contributories, and that of the vendor placed thereon. The vendor then filed his bill against the jobbers to compel them to indemnify him against all liability in respect of the shares, and to repay him all calls he might have to pay thereon, with costs. After the Defendants had put in their answer, an agreement was entered into between the Plaintiff and the liquidator for a compromise of the Plaintiff's liability on the shares (amounting to £5400), the terms of which were, in substance, that the Plaintiff should pay the liquidator £2000, transfer the shares to him, and authorize him to use his name in all proceedings against the Defendants, and to retain all moneys recovered therein, which were to be applied in recouping the Plaintiff the £2000, and in satisfying all liability on the shares, in consideration whereof the Plaintiff was, after all proceedings were over, to be released from all liability on the shares without further payment. Upon the hearing of the cause (*Nickalls* v. *Merry* (1) having meanwhile been decided in the House of Lords), the Defendants did not dispute their liability to the Plaintiff as vendor of the shares, but they contended that the release comprised in the agreement enured for their benefit, so as to make the £2000 payable thereunder by the Plaintiff the measure of their own liability either to the Plaintiff or to the liquidator:—

Held, that, the object and spirit of the agreement being to keep up and enforce the liability of the Defendants, they could not set it up without giving effect to all its provisions, and consequently that it did not operate as a release in their favour, or relieve them in any degree from their liability to pay the full amount payable on the shares.

Observations on the authorities, including *James* v. *May* (2) and *Kains* v. *Paine* [1874 K. 21].

Statement.

IN the month of October, 1865, the Plaintiff, who was the owner of sixty £100 shares in the *Contract Corporation, Limited*, on which

(1) Law Rep. 7 H. L. 530. (2) Law Rep. 6 H. L. 328.

£10 only had been called or paid up, sold the shares, through his brokers, on the *Stock Exchange* in the usual manner, to the Defendants, Messrs. *Hammon & George Paine*, who were members of the *Stock Exchange*, and carried on the business of stockjobbers in partnership. On the "name day" the Defendants delivered to the Plaintiff a ticket in the usual form, giving the name of one *Henry Baker* as the proposed transferee of the shares. A transfer to *Baker* was accordingly executed on the 25th of October, 1865, and *Baker's* name was registered in the books of the corporation as the holder of the shares. On the 20th of March, 1866, the corporation was ordered to be wound up, and by an order made in the liquidation by the Master of the Rolls on the 11th of November, and affirmed by the Lords Justices on the 8th of December, 1871, *Baker's* name was, upon his own application, removed from the list of contributories, upon the ground that at the date of the transfer of the shares to him he was an infant of the age of nineteen. On the 17th of April, 1872, the Plaintiff was, on the application of the liquidator, placed on the list of contributories in respect of the sixty shares transferred to *Baker*, and he thus became liable for calls to a very large amount. The Plaintiff then, in August, 1872, filed the bill in this suit, praying for a declaration that the Defendants were bound to indemnify him against all liability in respect of the sixty shares, and that they might be ordered to repay him all calls he had paid or might be compelled to pay in respect of the shares, and all costs occasioned by his being placed on the list of contributories, and to give him such indemnity as the Court might consider sufficient against any liability to which he might be subject in respect of the shares.

The Defendants, by their original answer to the bill, stated that they were in total ignorance as to who *Baker*, the transferee, was, or whether he was in fact an infant; that his name was supplied to them by a firm of stockbrokers to whom they had themselves sold the shares; and that they, the Defendants, were not responsible for having had an improper name supplied to them, as, according to the custom of the *Stock Exchange*, the original vendor was bound himself to make inquiries as to the sufficiency of the name, and that, having accepted the name supplied, the contract had become one between the seller and the nominee, so as to

V.-C. H. 1876

HERITAGE v. PAINE.

Statement.

relieve the jobber from all responsibility; and they claimed the benefit of the Statutes of Limitation.

After the Defendants had put in their answer, an agreement for the compromise of the Plaintiff's liability in respect of the sixty shares was entered into between him and the liquidator. By this agreement, which was dated the 9th of July, 1873, after reciting the transfer from the Plaintiff to *Baker*, the infancy of *Baker* at the time of the transfer, and the rectification of the list, and that a call of £90 per share had been made upon the Plaintiff in respect of the sixty shares, in respect of which there was due from him the sum of £5400, and that Plaintiff alleged that the Defendants were bound to procure for him a release and indemnity from all liability and loss, and had filed a bill against them to enforce his demand, and that the Plaintiff had proposed, in consideration of the agreement with the liquidator therein contained, to pay him the sum of £2000, and to give him the authority thereinafter contained, it was thereby agreed—1. That the Plaintiff should pay to the liquidator the sum of £2000, and should, when required, transfer to the liquidator on behalf of the company the sixty shares, and all his interest therein, and in the distribution of the assets of the company. 2. The Plaintiff authorized the liquidator to use his name in instituting, prosecuting, or compromising any proceedings or claims (including the suit of *Heritage* v. *Paine*) against the Defendants or any other persons in respect of the shares, for the purpose of compelling them to procure a release for the Plaintiff from all liability in respect of the shares, or to pay the calls made or to be made upon them. 3. That the Plaintiff should give the liquidator every assistance in the prosecution of any such proceeding or claim. 4. The Plaintiff authorized the liquidator to retain any moneys received in the suit against the Defendants in respect of the shares, and thereout to retain his costs and expenses, and then to apply one moiety of the surplus, first, in satisfying any indebtedness of the Plaintiff to the liquidator in respect of the £2000, and, secondly, in repaying to the Plaintiff any moneys paid on account of the £2000, without interest, and the remaining moiety, and the excess of the first moiety, and all other moneys received by the liquidator, after deducting expenses, were to be applied by the liquidator in satisfaction of so much of the Plaintiff's liability on the shares as was not

satisfied by the £2000, provided that when more than £5400 and the costs should have been recovered or paid, the liquidator should pay the Plaintiff the surplus. 5. The liquidator should forthwith after the termination of all suits, under the authority aforesaid, procure for the Plaintiff an absolute release from all liability in respect of the sixty shares, without any further payment. 6. The company should keep the Plaintiff indemnified against all costs and expenses. 7. If the Plaintiff made default in payment, the liquidator might either enforce payment or abandon the agreement. 8. The agreement was not to prejudice or affect the rights and remedies of the company or the liquidator against any other contributory.

The Defendants, having become aware of this agreement, on the 13th of July, 1875, filed a supplemental answer, whereby they stated the agreement, said that they believed the £2000 had been paid, and they insisted that, having regard to its provisions, the liquidator could not now enforce any calls against the Plaintiff in respect of the shares, as to which the Plaintiff was no longer under any liability whatever, so that the utmost relief to which he could be entitled against them was the payment of the £2000 and interest; that the suit was in fact the suit of the liquidator; that the Plaintiff only sued as a trustee for the liquidator, to whom the Defendants were never under any liability, the Plaintiff being the only person liable to the company; and that, as between the Plaintiff and the Defendants, if he had been released from liability, such release enured for the benefit of the Defendants.

The Plaintiff then amended his bill by alleging "that he was, and had ever since the 12th of October, 1865, been, a trustee for the Defendants of the said sixty shares," and that the Defendants were, under the circumstances therein appearing, and by the usage and practice of the *Stock Exchange* thereinbefore mentioned, "bound to indemnify and protect the Plaintiff against all liability in respect of the said sixty shares;" and that he "had entered into an arrangement with the company, under which he was now suing partly as trustee for the company."

The cause now came on for hearing, and it being admitted that after the decision in *Nickalls* v. *Merry* (1) the Defendants could

(1) Law Rep. 7 H. L. 530.

V.-C. H. 1876 HERITAGE v. PAINE.

not dispute their liability to the Plaintiff as vendor of the shares, the question argued was whether the agreement entered into between the Plaintiff and the liquidator had varied the rights of the parties so as to relieve the Defendants from any, and what part, of that liability.

Argument.

Dickinson, Q.C., and *Romer*, for the Plaintiff:—

The agreement comprised in the deed of the 9th of July, 1873, leaves the liability of the Defendants just where it was. The whole scheme of the arrangement was to keep their liability fully to indemnify the Plaintiff on foot, to enable the liquidator to sue in the Plaintiff's name; and it is not until everything has been recovered from the Defendants that the Plaintiff is to have the release, which the Defendants contend now enures for their benefit. The same sort of arrangement was upheld by Vice-Chancellor *Malins* on the hearing of *Hemming* v. *Maddick* (1), whose judgment was affirmed by the Lords Justices (2), and was also upheld in *James* v. *May* (3), though when that case came before the House of Lords it turned out that the deed, on the effect of which the arguments up to that time had chiefly turned, had, in fact, never been executed.

We are entitled not only to be recouped the £2000 which we have paid to the liquidator, but to a decree which will indemnify us to the full extent of the unpaid calls, with interest and costs.

Bristowe, Q.C., and *W. W. Karslake*, for the Defendants:—

The Plaintiff, who alleges that he is suing as trustee for a company, cannot recover more than he is absolutely indebted, or has paid to the company. The arrangement for the compromise of the claims against the Plaintiff carried out by the deed of the 9th of July, 1873, comes to this, that the company, having through its liquidator a clear claim against the Plaintiff for unpaid calls, agrees that if he will pay to the liquidator £2000, that sum shall be the measure of his liability, and after that agreement the liquidator can never obtain one penny more than the £2000 from the Plaintiff. The Plaintiff having paid this £2000, is under no

(1) Reported on an interlocutory application, Law Rep. 9 Eq. 175.
(2) Law Rep. 7 Ch. 395.
(3) Ibid. 6 H. L. 328.

further liability, and the indemnity to be given to him by the Defendants ought not to extend beyond his liability, and should be limited to repaying him the £2000 with interest.

Kains v. *Paine* [1874 K. 21] was a similar suit to the present; the only difference (if in principle it be one) being that there the agreement for compromise between the liquidator and the Plaintiff was entered into before the commencement of the suit. The Master of the Rolls in that case, in his decree dated the 6th of May, 1875, after declaring that the Defendants were bound to indemnify the Plaintiff against all losses already incurred in respect of the shares there in question, directed an inquiry whether the Plaintiff was under any and what further liability in respect of the shares, which inquiry must have been granted on the footing that the compromise had altered the Plaintiff's rights. We are willing to submit to a decree in that form.

The compromise in this case in effect amounts to a covenant not to sue, and that is a release in law (1).

If the Plaintiff was discharged as between himself and the liquidator, the liquidator can have no further right against the Defendants; honesty would forbid it.

[HALL, V.C.:—It is not a question of honesty; the parties have tried to keep matters *in statu quo* in order to hit the right persons.]

This is a simple contract of indemnity, and the Court has to decide as between the Plaintiff *Heritage*, who asks to be indemnified against future liability, when all possible calls have been made and he has been released from them, and the Defendants, between whom and the liquidator there is no privity. This is no case of trusteeship. *Hemming* v. *Maddick* (2) and *James* v. *May* (3) are cases of trusteeship, and it is but right that a trustee should be fully indemnified by his *cestui que trust*. So also was *In re National Financial Company* (4), where *Maitland* was a trustee exposed to liability for future calls. But there is no trust in question in this case, nor anything but the effect of the contract. If the Plaintiff is under no future liability, then the Defendants can only

(1) 2 Wms. Saund. pl. 1, 150 b.
(2) Law Rep. 9 Eq. 175.
(3) Law Rep. 6 H. L. 328.
(4) Ibid. 3 Ch. 791.

V.-C. H. 1876

HERITAGE v. PAINE.

be called upon to indemnify him to the extent of the £2000 and interest, and the decree to that effect ought to be made without costs.

[They also referred to *Cruse* v. *Paine* (1).]

Judgment.

HALL, V.C. :—

When the bill in this suit was filed the state of the law as regards the liability of a purchaser of shares to indemnify the original vendor under such circumstances as exist in this case was in an unsettled state; and the substance of the defence set up by Messrs. *Paine* in their answer was that, under the circumstances, they were not liable to indemnify the Plaintiff. The pleadings and the issues between these parties were in that state when the decision of *Nickalls* v. *Merry* (2), in the House of Lords, established the liability of persons in the position of Messrs. *Paine*, in similar transactions, to indemnify the vendor. Therefore, the law being so settled, if matters had remained in that position, there would have been nothing to try between these parties, and there must necessarily have been a decision in the favour of the Plaintiff.

An arrangement was, however, come to between the Plaintiff and the liquidator of the company in reference to the Plaintiff's liability and to the payment of the calls made or to be made in respect of the shares; and the Plaintiff thereupon amended his bill by stating "that he was, and had ever since the 12th of October, 1865, been, a trustee for the Defendants of the said sixty shares," and that he "had entered into an arrangement with the company, under which he is now suing, partly as a trustee for the company." The Defendants then having ascertained what the exact nature of that arrangement was, set it out in a supplemental answer, and submitted that its effect was to release and discharge them from any payments to be made in respect of the shares in question other than and except such payments as under that arrangement were to be made by the Plaintiff out of his own pocket. The substance of that arrangement was, that the Plaintiff was to pay by certain instalments a sum of £2000, with

(1) Law Rep. 4 Ch. 441. (2) Law Rep. 7 H. L. 530.

interest; and if he on his part performed in all respects the engagements of the deed of arrangement, he was not to be called upon to pay anything more. But the deed also provided, in effect, that this arrangement was only as between the Plaintiff and the liquidator, that the then existing suit which was going on to make the Defendants liable for the whole amount of the calls should go on, and that, in substance, what could be got in that suit should be got for the benefit of, and paid over to, the liquidator. The substance of the arrangement, therefore, as between those parties, was not to relieve the Defendants from anything whatever; on the contrary, to keep up and enforce their liability, and to procure all that could be got under it; and, instead of putting what was procured into the pocket of the Plaintiff, to let it go, where it must eventually go, into the pocket of the liquidator; and its working as between the Plaintiff and the liquidator (between whom, in reference to this particular claim, there was, as has been said, no privity) would be substantially the same as if the Plaintiff had borrowed the money to pay the liquidator the whole of his demand—the whole of the demand being what undoubtedly the Plaintiff, in the absence of any arrangement, was entitled to recover from the Defendants; and having so paid it over to the liquidator, the Plaintiff would then be left to get it back again from the Defendants, Messrs. *Paine.*

The contention before me however is, that this arrangement operated as a release to the Plaintiff, and that inasmuch as he cannot now be sued, and is to be indemnified by the liquidator from all costs in the further prosecution of the suit, that on payment of the £2000 that agreement operates for the benefit of the Defendants, who in the absence of it would have been liable to pay over £3000 more.

If this contention be correct, the parties must have wonderfully miscarried in carrying into effect what they desired to accomplish. Unquestionably, as matters stood at that time, the liquidator might have claimed from the Plaintiff not merely the £2000, but the full amount of all the calls, and, if they had not been paid, might have made him bankrupt, and have recovered any balance from the Defendants. To say that the effect of the arrangement is that it operates as a release to the Defendants is,

V.-C. H. 1876 HERITAGE v. PAINE. Judgment.

I think, to disregard not only its clear and express terms, but also its spirit; and it would be against all principle to allow the Defendants to claim the benefit of the arrangement comprised in the deed as a release to them, and at the same time entirely to disregard that which was of the essence and the spirit of the same arrangement, that although the Plaintiff was released, the claim against the Defendants was to be prosecuted to the full extent. To permit this would be to allow the Defendants to approbate and reprobate. If they set up that deed as one of which they can claim the benefit, they must do so, giving effect to all its provisions; and an essential part of those provisions is, that the then existing suit shall go on, and all that can be recovered shall be recovered for the benefit of the liquidator. In other words, the nature of the arrangement was that matters should remain *in statu quo* as between the Plaintiff and the Defendants; that the Plaintiff should become a trustee of, and pay over to the liquidator all that should be recovered from the Defendants, paying also to the liquidator the £2000, which sum he was to get back again if he could, but could only do so if Messrs. *Paine* were made liable, but as to that he took his chance. That, therefore, is the view which I take of the case, upon principle and irrespective of authority.

Then as to the authorities. It has been said that the cases which have been referred to were not cases of this kind, but cases of trusteeship in which a trustee, who must be fully indemnified, has sought for indemnity against his *cestui que trust*, and that there was a distinction between the indemnity in such a case and that to which a vendor of shares, under such circumstances as are here present, would be entitled as against an immediate purchaser from him. Now I will not say whether or not it may be possible to draw any such distinction between the two cases; but for all substantial purposes, and for the purposes of this suit, I think there is no such distinction where the transfer was set aside on account of the infancy of the transferee.

The Plaintiff was in the position of a fully paid vendor, who had received everything he was entitled to, and he had become a trustee for his purchaser of the subject-matter of the sale, which, however, instead of being valuable was the reverse. Therefore, it seems to me that the case became one of a trustee and *cestui*

que trust, and that there really is no distinction between the two cases. But whether there be or not, there is, I think, no distinction in substance.

The cases that were referred to were, first, *In re National Financial Company* (1); but the particular question which arises in this case, as to the effect of a deed of indemnity, did not there arise; and the only bearing that that case has upon the present is, that *James* v. *May* (2), which is somewhat in point, was treated as governed by the same principles. *James* v. *May* was first before Vice-Chancellor *Stuart*, who declined to make any order upon the summons, on the ground that he did not think that any trust had been proved; it then went before the Lords Justices, and they discharged the order of the Vice-Chancellor, and granted the prayer of the summons; and it finally came before the House of Lords, who affirmed the judgment of the Lords Justices. The circumstances in that case were somewhat similar to the present. There had been a deed of arrangement entered into between *May*, the trustee, and the directors of the *Wharves Company*, which was dated the 6th of August, 1869, before the commencement of the litigation as to the indemnity, which was by application in the winding-up. I mention that, because there is that difference between *James* v. *May* and the present case (which is certainly not unfavourable to the latter), and also between *James* v. *May* and *Kains* v. *Paine*. I have been furnished with the printed case before the House of Lords in *James* v. *May*, which contains particulars as to the deed of the 6th of August, 1869, and also the judgments of the Lords Justices, which are not to be found in the reports. In that case, it was a part of the arrangement comprised in the deed that, "in consideration of the *Wharves Company* agreeing (as they hereby do) to forego their right of process against the said *James Alexander May* personally in respect of the matter hereinbefore mentioned, and for other good considerations, the said *James Alexander May* doth hereby assign to the *Wharves Company* and their successors all and every the sums and sum of money which the said *James Alexander May* is, or he or his successors may hereafter become entitled to receive from the said *International Contract Company* in respect of or towards

(1) Law Rep. 3 Ch. 791. (2) Law Rep. 6 H. L. 328.

V.-C. H. 1876 HERITAGE v. PAINE Judgment.

or in the shape of dividends upon the sum of £24,890 and interest, and costs, charges, and expenses hereinbefore mentioned, together with the power in the name or names of the said *James Alexander May*, his executors or administrators, or otherwise, to demand, enforce, receive payment and delivery of the said premises hereinbefore expressed to be hereby assigned, and upon such terms as the said attorneys shall think fit to adjust and settle." It was a deed and an arrangement much of the same character as in the present case, but the deed was not so complete in its provisions as in the present case; and the contention before the Lords Justices in that case was, as it is here, that the deed had got rid of the liability altogether. Lord Justice *James* would not allow that: he considered it a reasonable arrangement that whatever should be recovered should be handed over so as to go into the right pocket. The Lord Justice *Mellish* took the same view, and expressed himself thus: "Then it is said that the deed has got rid of it. I cannot see how that can be. The Lord Chancellor says this in *In re National Financial Company* (1), that the trustee need not wait until he is actually sent to prison, but is entitled, on being threatened, at once to commence his suit or his claim, if it is under the *Winding-up Act*, for the purpose of obtaining his indemnity. Then why may he not say to the people who threaten to sue him, 'Do not sue me; if you do not sue me I will allow you to use my name in prosecuting the inquiry.' That is substantially the effect of the deed, and I do not see why it should not be perfectly good, because the effect of it merely is to make those who ought unquestionably to pay the costs, pay them."

Mr. *Bristowe*, in his very able argument, contended that the deed operated as a release. He referred to cases in which it has been held at law that a covenant not to sue may operate as a release. But there is no covenant here not to sue. The covenant or engagement is, that if *Heritage* does all that is required by this agreement in the way of facilitating the suing of the Messrs. *Paine*, and making these payments, and otherwise, then, when the liquidator has got from Messrs. *Paine* what, according to this engagement, *Heritage* was, by giving the use of his name, to assist him in getting, the liquidator would do his best to get

(1) Law Rep. 3 Ch. 794, 795.

him a release. It is no release of existing matters, but it is one conditional and dependent upon that being done which I am asked to say cannot be done at all, and which, it is contended, is not within the meaning of the arrangement. It would be a contradiction of the terms of the arrangement to call that a release as operating in any way as an engagement not to sue the Plaintiff, except coupled with this, that he is to do all this, and that that is to be part of the arrangement that is being done, and being continued to be done, by this suit; and this cause is brought to a hearing for the purpose of obtaining a decree to give effect to this arrangement, and without which the arrangement will not be given effect to.

Then there is the case of *Hemming* v. *Maddick*, which was first before Vice-Chancellor *Malins* (1) on an application to amend the bill, when His Honour did not seem to have taken a very favourable view of the case of the Plaintiff, who was substantially in the same position as the Plaintiff in the present case. There had been a deed executed in that case very much of the same character as that in this suit. The cause, however, came before him upon the hearing, and then he made a decree in the Plaintiff's favour. That was the subject of an appeal, which was dismissed with costs (2). The Respondent's counsel were not called upon, and the Lords Justices, whose judgments are very short, held that the trust was clearly established, and that the Plaintiff was entitled to an indemnity against calls.

That is the state of the authorities, except that *James* v. *May* subsequently went to the House of Lords. There, again, as in the present case, a deed was relied upon, and that deed was not substantially different from the present one, except as to its form, and except that the present deed was executed after the institution of this suit. It was there contended that the deed was a release; and it was only after considerable argument that it was found out that the deed in fact had never been executed, and had no existence at all (3). Therefore the argument was all thrown away. So matters remained. Lord *Cairns* made an observation

(1) Law Rep. 9 Eq. 175.
(2) Ibid. 7 Ch. 395.
(3) This fact is not stated in the report in Law Rep. 6 H. L. 328, but appears from the judgments of Lords *Chelmsford* and *Cairns*.

V.-C. H. 1876 HERITAGE v. PAINE. Judgment.

upon it, but thought it better not to intimate what opinion he might be inclined to form after full argument, supposing the deed were established. The Respondents had not been heard, and there the matter rested.

I have already dealt with the case upon principle, independently of the authorities; but the authorities, which must be dealt with as I find them, have a bearing upon the case, and I am bound to follow the authority of the Lords Justices in *James* v. *May*. There was nothing that took place in the House of Lords which I can regard as intimating an opinion adverse to that of the Lords Justices. Upon my own judgment, and following their decision, I hold that the Plaintiffs are right.

The only other authority which it is necessary for me to mention is the case of *Kains* v. *Paine* [1874 K. 21], which was argued before the present Master of the Rolls. I have been furnished with the shorthand notes of the argument and of what took place upon the hearing, the whole of which I have read. That case took up part of two days before the Master of the Rolls, and each side in this case has claimed the benefit of his observations. The Master of the Rolls, however, ultimately came to the conclusion that he could not deal with the case satisfactorily, owing to the number of the items of account, and the manner in which the matters in question were involved. What he said was in effect this: "This is an item in the account; you are entitled to the indemnity, no doubt, but these discussions about the extent of liability, under the circumstances, will be involved when you come to that item, and for which you claim a particular sum in respect of calls made, and so forth; and I think, under those circumstances, it is the course of the Court not to deal with that particular item, but I must direct an inquiry, and have an account taken." The Master of the Rolls said at last, the form of the decree being discussed: "That will leave the point entirely open." So it is entirely open, I conceive, under that decree, and it will come before him, upon the certificate, for discussion.

The case before the Master of the Rolls was of a much more complicated character as regards the particular matters which were the subject of the account and the inquiry than the present case. In that case the deed had been executed before the litigation

commenced, and the Master of the Rolls, in distinguishing the case before him from one of the earlier cases, dealt with it in a way that seemed to indicate that he thought there was a substantial difference between the two cases. Whether it is fair or right to say that he entertained that view, or merely threw it out, it is not necessary for me to say. This case is, as regards the extent and character of the claims, one of a very simple character, involving no complication of facts or details, although probably there may be some inquiry as to the amount. But the case having been most fully argued and discussed on the present occasion, it seems to me that the proper course for the Court to take is not to withhold giving its judgment in reference to the particular matter in dispute, because such judgment will dispose of it. I can do this in one of two ways, either by making a declaration, or by giving directions in the decree that the account shall be taken upon certain principles in reference to the claim in dispute; and that I mean to do, so that I shall not have this matter before me again upon exceptions to the certificate. I will frame it in such a way as that the parties, if they desire it, may, without delay or difficulty, take the opinion of the Court of Appeal upon the question. I understand that the whole £90 has been called up, and the case in that respect differs from *Kains* v. *Paine*, where, although it was the same company, at the time when the suit was instituted £85 only had been paid up.

I declare that the Defendants are bound to indemnify the Plaintiff, and the Plaintiff having paid £2000 to the liquidator, that sum, with interest, must be repaid to him by the Defendants; and I also declare that the Defendants are liable to pay to the liquidator the whole of the calls to be made by him, and the Plaintiff requesting that the amount to become payable by the Defendants be paid to the liquidator, order payment to the liquidator accordingly. As regards the amount of the interest upon the unpaid calls, unless the parties agree upon the amount, there must be an inquiry.

Solicitors for Plaintiffs: *Linklater, Hackwood, & Co.*
Solicitors for Defendants: *James Crowdy & Sons.*

V.-C. H.

1876

Jan. 29;
Feb. 1, 12.

IRLAM *v.* IRLAM.

District Registrars, Powers of—Action for Administration—Decree on Summons for Administration, by Consent, of Real and Personal Estate by District Registrar—Rules of Court, 1875, *Order* XXXV., *r.* 1; *Order* XV., *r.* 1—*Judicature Act*, 1873, *s.* 66.

6 Ch D 194
— 693
10 Ch D 542

In the *Liverpool* District Registry an action was commenced by writ for the administration of real and personal estate, and statements of claim and defence having been filed, the action came on for trial. The District Registrar issued an administration summons, and made, by consent, a decree for administration of the real and personal estate, directing accounts and inquiries, and reserving further directions. The accounts and inquiries having been prosecuted, on application for directions as to setting down the action on further consideration:—

Held, that the proceedings in the District Registry were irregular, the District Registrar having no power to make a decree, even by consent.

The action coming on for trial as a short cause:—

Held, that, having regard to Rules of Court, 1875, Order XXXV., rule 1, it is only in default of appearance that a District Registrar can make an order under Order XV., rule 1, and that accounts and inquiries cannot be prosecuted in a District Registry, except by the direction of the Court or the Judge of the Division, under sect. 66 of the *Judicature Act*, 1873.

An application for a decree, with liberty to adopt the proceedings in the District Registry, was refused, but the usual administration decree was made, with a direction that the accounts and inquiries should be taken and made in the District Registry, and that the sale of the real estate should take place in *London* under the supervision of the Judge in Chambers.

Statement.

THIS was an action commenced by writ under the new practice for the administration of the real and personal estate of *Ellen Irlam*, deceased.

The action was commenced in the *Liverpool* District Registry, a statement of claim and a statement of defence had been delivered, and the action was brought on for hearing before the District Registrar. The Registrar then issued a common administration summons, intituled in the same manner as the writ, and thereupon made, by consent, a decree for the administration of the real and personal estate of the testatrix, directing the usual accounts and inquiries to be prosecuted in the District Registry, and reserving further directions. The accounts and inquiries so directed having been prosecuted in the District Registry,

Bardswell applied to the Court for directions as to setting the action down on further consideration, but

S Can first Counsel when Chr refused to order cost
be taxed in the Local reg?

HALL, V.C., declined to allow the action to be set down for further consideration, as in his opinion the proceedings were irregular, as the District Registrar had no power to make a decree, even by consent; and directed the action to be set down for trial in the ordinary way as a short cause.

V.-C. H. 1876 IRLAM v. IRLAM.

Feb. 12. The action now came on for trial.

Robinson, Q.C., and *Bardswell*, for the Plaintiff, referred to Rules of Court, 1875, Orders XXXIII. and XXXV., rule 4.

W. Pearson, Q.C., and *Clare*, for some of the Defendants, and

Simmonds, for the infant heir of the surviving trustee.

HALL, V.C.:— Judgment.

I have considered the question a good deal, and am of opinion that, having regard to the Order XXXV., rule 1, the District Registrar cannot enter judgment or make an order for an account unless by reason of the default of the Defendant; and that accounts and inquiries cannot be prosecuted in a District Registry, except by the direction of the Court or the Judge of the Division, under the 66th section of the *Judicature Act*, 1873.

Robinson, Q.C., then asked for the usual administration decree, with liberty to adopt the proceedings had in the District Registry.

HALL, V.C., refused to insert any such direction in the decree, but made the usual decree, directing accounts and inquiries, with some additional inquiries, and also the sale of the real estate; and directed the accounts and inquiries, under the circumstances, to be taken in the District Registry pursuant to the 66th section, but directed that the sale should take place in *London*, and be conducted in the usual manner under the supervision of the Judge in Chambers.

Solicitors: *Bridger & Collins*, agents for *Francis & Co., Liverpool.*

V.-C. H.

1876

March 17.

In re NASSAU PHOSPHATE COMPANY.

Company ordered to be wound up—Memorandum of Association—Certificate of Registration—One of the Seven Subscribers an Infant—Companies Act, 1862, *ss.* 6, 18—*Practice.*

Under the *Companies Act*, 1862, a company was in November, 1873, registered, but it did not commence business within a year afterwards. The Registrar certified that the memorandum of association had been subscribed by seven persons. The company was, in July, 1875, ordered to be wound up. On the proceedings before the Chief Clerk it was discovered that one of the seven persons was an infant at the time of registration; and as the Chief Clerk expressed a doubt whether he could proceed, the petition was presented by creditors, praying that the company might be ordered to be wound up as an unregistered company:—

Held, that, under the 6th and 18th sections of the *Companies Act*, 1862, there having been a certificate of registration, the winding-up order was valid:

Held, also, that the proper course would have been to have brought the question before the Judge in Chambers, and that as the petition had been improperly presented, it must be dismissed with costs.

Statement.

PETITION.

The Nassau Phosphate Company, Limited, was registered in November, 1873, for the purpose of carrying on the business of artificial manure manufacturers, but the company did not commence business within a year afterwards. The capital was £70,000, in 14,000 shares of £5 each. The memorandum of association was subscribed by seven persons only, of whom *L. A. Farmer* was one. The company having been unsuccessful, was, in July, 1875, ordered to be wound up on a shareholders' petition, and a liquidator was appointed. In the course of the proceedings before the Chief Clerk under that order it was discovered that *L. A. Farmer* was an infant at the time he signed the memorandum of association, and his name was, as alleged, removed from the list of contributories by the Chief Clerk, who at the same time expressed his doubts whether the liquidation could proceed, in consequence of one of the seven persons required under the statute for the incorporation of the company being under disability at the time of registration. A second winding-up petition was now presented by certain creditors of the company, alleging that "the memorandum of association never was, in fact, signed by seven persons competent to bind themselves

to take the shares in the company set opposite their respective names; that the registration of the company was invalid, and that the company could not properly be wound up as a limited company under the order of July, 1875." The Petitioners accordingly prayed that the company might be wound up as an unregistered company, and that the liquidator appointed under the previous order might be continued.

Statement.

The arguments proceeded upon the assumption that the name of *L. A. Farmer* had been removed from the list of contributories.

Argument.

Hastings, Q.C., and *H. Burton Buckley*, for the present Petitioners, after stating the facts, referred to the case of *In re Hertfordshire Brewery Company* (before the Master of the Rolls, February 14, 1874), where, the circumstances being similar, the Master of the Rolls ordered the former liquidator to be continued, directing him to give new security for the same amount as before, and gave liberty to adopt any of the proceedings under the former order. This company being at the time, as submitted when the former winding-up order was made, an unregistered company, the order should have been made under the 199th section of the *Companies Act*, 1862, and not, as was done, on the ground of not commencing business within a year from its incorporation, under the 79th section. No other ground was suggested for the order when it was made, and as there was no incorporation that order was invalid. The 18th section provided that, "upon the registration of the memorandum of association, and of the articles of association, in cases where articles of association are required by this Act, or by the desire of the parties to be registered, the Registrar shall certify under his hand that the company is incorporated . . . . the subscribers of the memorandum of association . . . . shall thereupon be a body corporate by the name contained in the memorandum of association, capable forthwith of exercising all the functions of an incorporated company . . . . but with such liability on the part of the members to contribute to the assets of the company, in the event of the same being wound up, as is hereinafter mentioned: a certificate of the incorporation of any company given by the Registrar shall be conclusive evidence that all the requisitions of this Act in respect

V.-C. H. 1876 *In re* Nassau Phosphate Company. Argument.

of registration have been complied with." The 17th section enacted that "the memorandum of association and the articles of association, if any, shall be delivered to the Registrar of Joint Stock Companies . . . . who shall retain and register the same . . . .;" and then provision was made for the payment of certain fees; and by the 6th section it was enacted that "any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this Act in respect of registration, form an incorporated company with or without limited liability." By the 4th section there was a provision that "no company, association, or partnership, consisting of more than twenty persons, shall be formed after the commencement of this Act," for the purpose of carrying on business for gain, "unless it is registered as a company under this Act . . . ." By sect. 200 it was provided that, "in the event of an unregistered company being wound up, every person shall be deemed to be a contributory who is liable at law or in equity to pay or contribute to the payment of any debt . . . ."

A new order was necessary, a doubt existing as to the validity of the former order. If the present liquidator was to go on, a purchaser of property from him would have a title upon which a doubt would be thrown. And the Petitioners asked that the matter should be made quite free from doubt; that the present liquidator should be continued, and that the proceedings should be adopted, and that the future proceedings should be upon that footing. If there had been an invalid registration, the appointment of the liquidator was bad; but under the 67th section of that Act that could be rectified.

They also referred to *Re Northumberland and Durham District Banking Company* (1), where Lord Justice *Turner* said: "If this company was not authorized to be registered, I take it to be quite clear that the certificate of registration can be of no avail."

Dickinson, Q.C., and *Strickland*, in support of the order of July, 1875, submitted that this was not an application to get rid of it. If it had been, it would have been opposed. The question ought

(1) 2 De G. & J. 357. 4 Jur. N.S. 419

to be tried whether that order was good or bad. The case of the *Hertfordshire Brewery Company* was not strictly in point. The facts were dissimilar, and in other respects the case was distinguishable. One of the seven persons in that case was an infant, and on attaining majority his name was removed from the list of contributories; but in this case *L. A. Farmer* attained majority in March, 1874, and in November of that year shares were allotted to him, and he was the holder of them in July, 1875. He had never applied to have his name taken off the list. There was a great difference between a contract being void and voidable. The Chief Clerk could not go behind the memorandum of association: *Peel's Case* (1). This petition ought to be dismissed, as the existing order to wind up the company had not been discharged.

They also referred to *Oakes* v. *Turquand* (2) and *Ex parte Hargrove & Co.* (3).

Hastings, in reply:—

The proceedings had not been regular, and were, therefore, abortive: *In re Bridport Old Brewery Company* (4). The removal of the name from the list made it clear that the memorandum was, in fact, signed by only six persons. The contention that although the name had been taken off, yet that *L. A. Farmer*, though an infant at the time, was still a person within the 6th section, could not be sustained. If a memorandum signed by one infant was valid, it would be valid if signed by seven infants. The object of the Act was that there should be seven persons who should be liable to creditors. Though the *Northumberland and Durham District Banking Company* was wound up under the Act of 1856, yet the sections which applied were identical with those in the Act of 1862. It was quite clear that an infant could not be a shareholder. There was no authority for holding that this was a good memorandum of association, and that there could be a winding-up under it. A certificate given under the provisions of an Act of Parliament was not always conclusive that what had been done was not *ultrà vires*: *Laing* v. *Reed* (5). The conclusion was that, there

(1) Law Rep. 2 Ch. 674.
(2) Ibid. 2 H. L. 325, 353, 354.
(3) Law Rep. 10 Ch. 542.
(4) Ibid. 2 Ch. 191–195.
(5) Law Rep. 5 Ch. 4.

V.-C. H. 1876 *In re* NASSAU PHOSPHATE COMPANY.

being a memorandum which ought not to have been registered, the certificate of the Registrar was of no avail. The company was never properly incorporated under the Act of 1862, consequently the Court had no jurisdiction to make the order of July, 1875, as that petition stated only one ground for it, viz., not commencing business within a year. As the Chief Clerk could not proceed further, these Petitioners had acted rightly in coming to the Court and asking for the winding-up of an unregistered company. The opinion of the Court was necessary under any view of the case, and therefore the Petitioners would be entitled to have their costs out of the estate.

Judgment.

HALL, V.C.:—

The question in this case is one of very considerable importance in reference to the constitution of companies under the Act of 1862. The contention on the part of the Petitioners is that if one or more—it may be all—of the seven persons subscribing the memorandum of association of a company be an infant or infants, the intended company does not become incorporated, all subsequent proceedings purporting to be under the Act are invalid, and if a winding-up order be made it is inoperative. The 6th section enacts that the memorandum of association must be signed by "seven persons." Is not an infant a "person"? The signature of an infant is not necessarily inoperative and void. The memorandum having been signed by seven persons, is taken to the Registrar for the purpose of registration; and the 17th section provides that the memorandum having been delivered to the Registrar, he "shall retain and register the same." It is not for him to inquire whether the persons subscribing it are infants. The memorandum being delivered to him, he, as in duty bound, proceeds to register it. By the 18th section it is enacted that the Registrar "shall certify under his hand that the company is incorporated," and that "the subscribers of the memorandum of association, together with such other persons as may from time to time become members of the company, shall thereupon be a body corporate capable forthwith of exercising all the functions of an incorporated company." And it is further enacted that "a certificate of the

incorporation of any company given by the Registrar shall be conclusive evidence that all the requisitions of this Act in respect of registration have been complied with." The memorandum and articles of association having been registered, are to be open to the public for the purpose of inspection, so that the public may be enabled to see by whom the memorandum was signed, and what are the business, powers, and objects of the company. That being so, upon a fair and reasonable interpretation of the 18th section, it is plain that the certificate of the Registrar is conclusive that the parties have become an incorporated body. That is what was done in the present case. But it has been found out that one of the subscribing parties was an infant, and it is contended that the whole of the proceedings are wrong; that there is no incorporated company; that consequently the original winding-up order is bad; and that the company consists of nothing more or less than a number of persons associated together as partners, and liable as such to any persons who may deal with them, and that such persons are in the position of having to enforce their claims, not by a winding-up order, as in the case of a duly incorporated company, but by suing each partner, thus raising questions how far each partner may be bound by agency or otherwise in the carrying on of the business. Anything more disastrous cannot be imagined. Some authorities have been cited. In the case of the *Northumberland and Durham District Banking Company*, the bank was not within the scope and meaning of the Act of 1862, and therefore could not be dealt with under it. The case of the *Hertfordshire Brewery Company* has been referred to, but, considering the circumstances of that case, and that the order was substantially one by consent, I do not think it is an authority for me to follow in this case. The other cases are in favour of the view that the certificate of registration is sufficient to incorporate a company, notwithstanding that one of the seven persons is an infant at the time. The observations of Lord *Chelmsford* in *Oakes* v. *Turquand* (1) are clear upon that point. In the *Princess of Reuss* v. *Bos* (2), Lord *Cairns*, after stating the facts of that case, said (3):

(1) Law Rep. 2 H. L. 325. (2) Law Rep. 5 H. L. 176.
(3) Law Rep. 5 H. L. 200.

V.-C. H. 1876 *In re* NASSAU PHOSPHATE COMPANY. Judgment.

"Therefore, taking the certificate of incorporation and the memorandum of association of the company, and taking the number of persons who applied for incorporation, and their subscriptions with regard to shares, it appears to me that all that the Act requires was complied with." In some of the cases under the 7 & 8 Vict. c. 110, viz., in *Pilborow* v. *Pilborow* (1) and in *Bawnem Iron Company* v. *Barnett* (2), the same question was more or less mooted, and the decisions were favourable to the view that effect should be given to the certificate of registration. Shareholders upon whom calls were made, there having been such a certificate, were not allowed to successfully dispute the payment of those calls in the winding-up.

Looking at this case from a reasonable and practical point of view, I think the Petitioners had not sufficient grounds for presenting this petition, and that they must have some ulterior object in view. The Chief Clerk seems to have entertained a doubt whether the winding-up could proceed, and made a note to that effect. That being so, the proper course was for the parties to bring the matter before me in Chambers, and my decision would have determined the point on the view which I take now, and without the expense of presenting a petition. The petition not having been properly presented, I cannot relieve the Petitioners from the payment of the costs of it.

Solicitors: *G. R. Dodd; Roy & Cartwright.*

(1) 5 C. B. 440. (2) 8 C. B. 406.

HICKMAN *v.* UPSALL.

V.-C. H.

1876

March 17, 22.

[1859 U. 16.]

Mortgagee in Possession under Order of Court—Death of Tenant for Life and Mortgagor, Presumption of—Liability of Mortgagee to account for Rents received from the date of presumed Death—Statutes of Limitation, 21 *Jac.* 1, *c.* 16; 3 *& 4 Will.* 4, *c.* 27, *s.* 42.

In 1859 a suit for, *inter alia*, administration was instituted by a tenant for life, under the will of the testator, of certain leaseholds, and who subsequently to the suit mortgaged her life interest. The mortgagee had, under an order made in November, 1860, liberty to and did enter into possession of the rents for the purpose of keeping down his interest and paying the balance to the tenant for life. In March, 1866, the mortgagor left her home and was never heard of afterwards. On a petition presented in 1875 by the parties entitled in remainder, it was *held* that the presumption was that the mortgagor died soon after June, 1866.

On a petition now presented by the same parties:—

Held, that the mortgagee, having entered into possession under the order of the Court, did not become a trespasser by the death of the mortgagor; that the Statutes of Limitation, 21 Jac. 1, c. 16, and 3 & 4 Will. 4, c. 27, s. 42, did not apply; and that the mortgagee must account for the rents received from July, 1866.

Re Lord Cheylesmore, 4 Ch. D. 144.

PETITION.

Statement.

John Upsall, who died in November, 1851, by will dated in January, 1851, gave certain leasehold premises and funds to trustees upon trust to pay the income to his daughter *Sophia* (afterwards *Sophia Hickman*) for life, and after her death to pay the funds to the Petitioners.

Sophia Hickman, in July, 1859, assigned to *C. M. Samson*, the present Respondent, her life interest under the will, and also a policy of assurance on her life, to secure the repayment of money lent to her and interest. The same beneficial life interest was further charged, and two new policies were, in August, 1859, and January, 1860, assigned by her to secure other sums lent by *C. M. Samson*.

The suit was instituted for the purpose of making the trustees liable for not getting in and investing a certain debt, and of having the trusts of the will administered by the Court.

V.-C. H.
1876
HICKMAN
v.
UPSALL.
Statement.

On the hearing of the cause (1), Vice-Chancellor *Stuart* ordered that during the life of *Sophia Hickman*, or until further order, payment of the dividends on the funds, to which she was entitled for life, under the will, to be made to *C. M. Samson* in discharge of the interest that might accrue due on the moneys lent, and the premiums on the policies mortgaged by her; and as to the leaseholds, the decree directed that the trustees should pay the rents to *C. M. Samson* during the life of *Sophia Hickman* or until further order, to the extent necessary for keeping down the interest on the mortgages and premiums on the policies; and that the trustees should pay the residue to *Sophia Hickman*.

By an order on further consideration, dated the 9th of November, 1860, *C. M. Samson* had liberty in effect to enter into possession of the leaseholds, and, without the intervention of the trustees, to pay herself the sums due in respect of her securities, and to deal with the annual residue of rents in manner previously directed. She did enter into possession of the property.

Sophia Hickman, on the 25th of March, 1866, left her home and was never heard of again. In 1875 a petition was presented by the present Petitioners for the purpose of having, after providing for the costs, certain funds standing to "the account of the personal estate of the persons expectant on the death of *Sophia Hickman*," transferred and paid to them, and for having the leaseholds sold and the proceeds paid to them. The funds so standing to that account represented the funds given by the will as above mentioned.

On the petition coming on to be heard on the 5th of March, 1875, Vice-Chancellor *Hall* ordered it to stand over for a month, directing inquiries to be made for *Sophia Hickman*.

On the petition coming on again (2), on the 16th of April, 1875, it was held that, under all the circumstances, there was a fair presumption that *Sophia Hickman* had died soon after June, 1866; and that, therefore, nothing became payable to the mortgagee after that time. The accumulated dividends on the funds in Court, as well as those funds themselves, were ordered, subject to the payment of costs and duty, to be distributed among the Peti-

(1) 2 Giff. 124. (2) Law Rep. 20 Eq. 136.

tioners, and the leaseholds were ordered to be sold. The sale of them was about to take place.

On the 5th of May, 1875, the Petitioners, by their solicitors, applied, in effect, for an account of the back rents.

The present petition was presented on the 10th of March, 1876, praying that an account might be taken of all sums which had been received by the mortgagee, *C. M. Samson*, since the month of July, 1866, and that what should be found due on such account might be distributed amongst the Petitioners in the proportions stated in the petition.

Argument.

E. Cutler, for the Petitioners:—

The mortgagee, *C. M. Samson*, went into possession of the leaseholds by virtue of the decree and order on further consideration of the 9th of November, 1860, and that placed her in a fiduciary position, which brought her within the exception of express trusts from the *Statute of Limitations*, 3 & 4 Will. 4, c. 27, s. 42; *Cox* v. *Dolman* (1). But in fact this petition was only a means of working out the previous orders in the suit, and was not of itself a suit within the meaning of the statute: *Edmunds* v. *Waugh* (2); therefore the Petitioners were entitled to an account of rents from the end of June, 1866, the time when the death of the mortgagor was presumed. Laches for not coming to the Court earlier than April, 1875, could not, under the circumstances, be imputed to the Petitioners.

[He also referred to *Lewis* v. *Duncombe* (3) and *Humble* v. *Humble* (4).]

Methold, for the mortgagee:—

This was an equitable ejectment. *C. M. Samson* must be considered to have been a mere trespasser from the time of *Sophia Hickman's* presumed death in June, 1866, as there was no trust except during the life of the mortgagor; therefore the account of rents ought not to be carried back further than the date of this petition.

(1) 2 D. M. & G. 592.
(2) Law Rep. 1 Eq. 418.
(3) 29 Beav. 175.
(4) 2 Jur. 696.

V.-C. H. 1876 HICKMAN v. UPSALL.

[He referred to *Hicks* v. *Sallett* (1), *Thomas* v. *Thomas* (2), *Morgan* v. *Morgan* (3), *Penny* v. *Allen* (4), *Hutton* v. *Simpson* (5), *Lewin* on Trusts (6), and to the statute 21 Jac. 1, c. 16.]

John Chester, for the other Respondent.

E. Cutler, in reply.

Judgment.

HALL, V.C.:—

I am of opinion that, as the mortgagee originally entered into possession under the order of the Court, I cannot hold that she became converted into a mere trespasser by the death of the tenant for life and mortgagor. Laches cannot be imputed to the Petitioners, inasmuch as it was not possible for them to come to the Court before the presumption of death arose. The case is not, in my judgment, within the *Statute of Limitations*, 21 Jac. 1, c. 16, nor within that of the 3 & 4 Will. 4, c. 27, s. 42, which restricts the institution of suits or actions for arrears of rent to six years; therefore the Petitioners are entitled to an account as prayed, but, considering all the circumstances of the case, the order will be without costs.

Solicitors: *J. & R. Gole; Proudfoot.*

(1) 3 D. M. & G. 782.
(2) 2 K. & J. 79.
(3) Law Rep. 10 Eq. 99.
(4) 7 D. M. & G. 409.
(5) 2 Vern. 722.
(6) 6th Ed. p. 727.

In re HEREFORD AND SOUTH WALES WAGGON AND ENGINEERING COMPANY.

C. A. 1876 Jan. 22; March 15, 18.

Company—Concealment—Fraud—Promotion-money—Charges—Void Agreement.

By an agreement made between the vendor of certain ironworks and *W.* and *H.*, it was agreed that, if *W.* and *H.* succeeded within three months in getting up a company for the purchase of the ironworks at a valuation, they should, out of the purchase-money, receive £1500. By an agreement dated a few weeks later, the vendor agreed with *W.*, as trustee for the company, that the company should buy the ironworks at a valuation. *W.* and *H.* did not get up a company within the three months, but after some time they formed a company with seven shareholders, who were also the directors. These shareholders were not informed of the agreement to pay *W.* and *H.* the £1500. The company was registered, and by the articles of association the agreement for the purchase of the property at a valuation was adopted, and it was provided that the directors should pay all expenses incurred in getting up and registering the company. Very few other shares were applied for: none were allotted, and the company was wound up.

W. and *H.* claimed in the winding-up remuneration for their services both before and after the company was formed, and the valuer claimed his charges for valuing:—

Held, that, though *W.* and *H.* might not have a legal claim as to services before the formation of the company, they would have had a good equitable claim, so far as the company derived benefit from them, and would have a legal claim as to services rendered after the formation of the company. But

Held, that the concealment of the agreement as to the £1500 constituted a fraud, and that as the shareholders had been by fraud induced to join the company, and as the company had received no benefit from the services of *W.* and *H.*, they could not claim from the company remuneration for those services:

Held, that any claim which the valuer might have was against *W.* and *H.* only.

Decision of *Hall*, V.C., reversed.

Statement.

H. E. SMITH was the owner of some ironworks at *Hereford*. By an agreement dated the 29th of April, 1872, he agreed with Mr. *H. J. Walter*, an accountant in *London*, and Mr. *H. S. Head*, a solicitor in *London*, that if they should succeed in forming a joint stock company for the purchase of his interest in the ironworks, according to a valuation to be made by Mr. *Bramwell*, C.E., the said *H. E. Smith* would, out of the purchase-money, pay to *Walter* and *Head* the sum of £1500 for promotion-money. It was further

C. A. 1876

In re HEREFORD AND SOUTH WALES WAGGON AND ENGINEERING COMPANY.

Statement.

provided that if the company was not formed within three months the agreement was to be void; also that the promotion-money was not to prevent *Walter* and *Head* from obtaining from the company payment for their services in getting up and registering the company. In pursuance of a previous arrangement between Mr. *Bramwell* and *Walter* and *Head*, Mr. *Bramwell*, on the 6th of May, 1872, valued the property at £14,974 10*s.*, and it was not contended that this valuation was unfair or excessive. On the 3rd of June, 1872, a deed was executed between *Smith* of the one part, and *Walter*, as trustee on behalf of the intended company, of the other part, by which *Smith* agreed that he would sell the property to the company for £5000 in fully paid-up shares and £9974 10*s.* in cash. The company was not formed within the three months, but *Walter* introduced the matter to seven gentlemen, who agreed to join the proposed company and to take shares in it. The memorandum and articles of association were registered in December, 1872. The capital of the company was to be £100,000. The deed of the 3rd of June, 1872, for the purchase of the works, was adopted. By the 21st clause it was provided that the directors should "pay all expenses incurred in getting up and registering the company;" and, by the 31st, *Head* was appointed the first solicitor, and *Walter* the secretary of the company. A prospectus was issued, but very few persons offered to subscribe for shares, so that no shares were allotted and the deposits were returned. The seven subscribers of the memorandum and directors were in fact the only shareholders.

An order was afterwards made to wind up the company. The debts and claims against the company amounted to £1240, of which part was for disbursements by *Walter* and *Head*, and that part was not disputed. But £312 was claimed by Mr. *Bramwell* for his valuation; £270 by *Head* for professional services rendered prior and subsequent to registration; and £193 by *Walter* for services in a similar manner.

The liquidators opposed these claims on the ground that the agreement as to the promotion-money had not been disclosed to the seven shareholders and directors. Four of the directors asserted also that they had been assured by *Head* and *Walter* that

nothing was to be paid for personal services unless the company was floated. This, however, was contradicted by *Head* and by *Walter*.

The Chief Clerk of the Vice-Chancellor *Hall* made, with the assent of the Vice-Chancellor, a certificate allowing these claims. The liquidators took out a summons to vary the certificate, but the Vice-Chancellor refused to vary it, declining to have the questions argued by counsel, and not wishing the summons to be adjourned into Court. He made no order on the summons, except that the costs were not to be paid out of the assets, but that the liquidators were to be at liberty to appeal to the Court of Appeal without further hearing before him.

Statement.

The liquidators then moved the Court of Appeal to vary the certificate.

Dickinson, Q.C., and *Romer*, for the liquidators:—

Argument.

The company has admitted all the other claims, but declines to pay for these alleged services. If the shareholders had been aware of this agreement as to the £1500, they would never have joined the company. *Walter* and *Head* were not working for the company, but for themselves; their only object was to get the £1500, and they ought not to be paid for what they did for themselves. As to Mr. *Bramwell's* claim, he was employed by *Head* and *Walter*, not by the company. We have never adopted that contract, and are not bound by it.

Crossley, for the claimants:—

The old agreement is gone, as the company was not formed within the three months. We have never received and we do not claim the £1500, but we are entitled to be paid for our services. Independently of the express provision in the articles of association, the person who takes the benefit of work done must pay for it. The company was not injured by the agreement as to the £1500, which would be paid by the vendor. The company got full value, and it is admitted that the valuation was fair, if not an undervalue. As to the charges incurred after the formation of the company, these applicants have a clear right to recover them, and must have succeeded in an action at law if the company had not

C. A. 1876 *In re* HEREFORD AND SOUTH WALES WAGGON AND ENGINEERING COMPANY.

been wound up. As to the preliminary expenses, the promoters must pay them, even though the company is abortive: *In re Tilleard* (1); *In re Kensington Station Act* (2).

Dickinson, in reply.

Judgment.

March 18. The judgment of the Court (*James*, L.J., *Mellish*, L.J., and *Baggallay*, J.A.) was now delivered by

MELLISH, L.J., who, after stating the facts of the case, continued:—

Under these circumstances, we have to determine whether Mr. *Head* and Mr. *Walter* are entitled to prove against the company in respect of their professional services, either those before or those after the registration of the company.

With respect to their professional services before the formation of the company, they would not have been entitled to maintain an action on legal grounds against the company, because the company was not in existence at the time when the services were performed; and the 21st article of association only gives an authority to the directors to pay these costs, and does not constitute a contract to pay them as between the company and Mr. *Head* and Mr. *Walter*. We think, however, that if the company can properly be considered to have adopted and derived benefit from these services, they would in equity be bound to pay for them, and Mr. *Head* and Mr. *Walter* would be entitled to prove for them.

With respect to the services subsequent to the registration of the company, Mr. *Head* and Mr. *Walter* would be entitled to maintain an action against the company, unless the company have a defence upon some legal or equitable grounds.

The defence of the company to both claims entirely depends upon the effect of Mr. *Walter* and Mr. *Head* having concealed from the seven gentlemen who signed the memorandum of association the agreement of the 29th of April, 1872. We think it is clearly established that the company was formed by Mr. *Walter* and Mr. *Head*, in pursuance of a scheme formed between them and *Smith* to carry out the two agreements of the 29th of April and the 3rd

(1) 3 D. J. & S. 519. (2) Law Rep. 20 Eq. 197.

day of June, 1872. As between *Smith* and *Walter* and *Head*, these two agreements obviously constituted only one agreement, but they were divided into two, in order that the part of the agreement which related to the payment of the £1500 to Mr. *Walter* and Mr. *Head* out of the purchase-money might be concealed from the company. There can be no doubt that the concealment of this part of the agreement from the company was a fraud upon the company. It is similar to many transactions with which the Court has unfortunately become familiar, and amounts to an agreement by a vendor with an agent of an intended purchaser to give him a bribe to betray the interests of his principal.

The question we have to determine is whether the fraudulent concealment is so connected with the claims of Mr. *Walter* and Mr. *Head* as to afford a ground for rejecting the proof. It was argued on behalf of Mr. *Walter* and Mr. *Head* that, as the company was not registered within three months from the 29th of April, the agreement of that date had come to an end before the formation of the company. We are satisfied, however, that, notwithstanding the three months had elapsed, the parties were still carrying out the entire scheme into which they had entered. Mr. Smith might, no doubt, if he had pleased, have abandoned the scheme upon the expiration of the three months, but he could not practically go on with it and yet prevent Messrs. *Head* and *Walter* from retaining the £1500 out of the purchase-money. The fact that the company was formed proves to us that the scheme was going on.

It was next argued on behalf of Messrs. *Walter* and *Head* that, although if the company had been successfully started, and the contract with *Smith* had been carried out, and the £1500 had been paid to *Walter* and *Head*, they might have been compelled to repay the £1500, that was the only remedy which a Court of Equity would give in respect of a fraudulent concealment of this nature. We cannot agree with this argument. If the company had been successfully started, and it had suited the company to ratify the agreement with *Smith*, and go on with the business notwithstanding the concealment, it may be that their only remedy would have been to retain or recover the £1500, and that they

C. A. 1876

In re HEREFORD AND SOUTH WALES WAGGON AND ENGINEERING COMPANY.

Judgment.

could not have avoided paying *Walter* and *Head* for any services from which the company had received benefit; but it does not at all follow that in the events which have happened, the company having become wholly abortive, they are bound to pay for services which have been of no value whatever to the company. It seems to us that the fraudulent concealment is directly connected with the formation of the company. The seven gentlemen who signed the memorandum of association were asked to form a company to carry out an agreement made between *Smith* and *Walter* for the sale of the ironworks to the intended company, whilst a material part of the agreement was fraudulently concealed from them. Nobody can tell what effect it would have had on their minds if they had known that *Walter* and *Head* were not the disinterested persons they pretended to be in recommending these directors to join the company. We think they are entitled to say, "We were induced by fraud on the part of *Walter* and *Head* to form the company. We were induced by fraud to assent to the articles, and it was by those articles that *Walter* and *Head* were to be paid for their services in promoting the company, and were appointed solicitor and secretary of the company." We think, therefore, that the company have a defence to the claim of Mr. *Walter* and Mr. *Head* in respect of their services in promoting the company, upon the ground that the company have received no benefit from those services, and that it would be inequitable to allow them to recover payment for those services from the company, which is entirely composed of the seven gentlemen whom they have by fraud induced to join the company; and we also think that the company have a defence to the claims of Mr. *Walter* and Mr. *Head* in respect of their services as solicitor and secretary subsequent to the formation of the company, upon the ground that the seven gentlemen, and therefore the company, were induced by fraud to appoint them solicitor and secretary of the company, and have received no benefit from their services.

We are of opinion that we are justified in holding, and that we ought to hold, that if the promoter of a company procures a company to be formed by improper and fraudulent means, and for the purpose of securing a profit to himself, which, if the company was

successful, it would be unjust and inequitable to allow him to retain, and the company proves abortive and is ordered to be wound up without doing any business, the promoter cannot be allowed to prove against the company in the winding-up, either in respect of his services in forming the company, or in respect of his services as an officer of the company after the company was registered.

With regard to the claim of Mr. *Bramwell*, he was employed by *Walter* and *Head* to make the valuation long before the company was formed. It is, therefore, perfectly plain that at law his claim could be only against them, and he could only claim against the company on the ground that *Walter* and *Head* would be entitled to be paid by the company the cost of the valuation as part of the expenses. But they have been held not to be entitled to recover those expenses from the company, and Mr. *Bramwell* has no independent equity of his own against the company. He was no party to the scheme of *Walter* and *Head*, and there is no reason to doubt that his valuation of the property was perfectly *bonâ fide;* but if the company had never been formed his claim would have been against *Walter* and *Head* only, and under existing circumstances he must be in the same position.

All the three claims must be disallowed, and the liquidators must have their costs in the Court below and of the appeal.

Solicitors for Liquidators: *C. C. Ellis & Co.*
Solicitor for Claimants: *S. H. Head.*

C. A.
1876
V.-C. B.
Jan. 11.
C. A.
March 27.

In re TOOTAL'S ESTATE.
HANKIN *v.* KILBURN.

[1870 T. 148.]

Will—Construction—Annuity—Abatement—Residue or Remainder.

A testatrix gave several life annuities and directed funds to be invested, producing an income sufficient to meet them. She bequeathed the residue of her estate, "including the fund set apart to answer the said annuities when and so soon as such annuities shall respectively cease," to *J. B. T.* The estate was only sufficient to pay about 5*s.* in the pound on the legacies and the values of the life annuities, and under an order of the Court the sums apportioned to the values of the life annuities were invested, and the dividends paid to the annuitants. On the death of one of the annuitants, *J. B. T.* applied for payment to him of the fund of which that annuitant had been receiving the income:—

Held, by *Bacon*, V.C., that *J. B. T.* was entitled:

Held, on appeal, that *J. B. T.* had only the ordinary rights of a residuary legatee, and could take nothing until the legacies and annuities had all been paid in full, and that his application must be dismissed.

Statement.

THIS was an appeal from a decision of Vice-Chancellor *Bacon*.

Marion Henson Tootal made her will, dated the 28th of April, 1869, which, so far as it need be stated for the purposes of the present case, was as follows:—

"I give to my brother *A. D. Tootal* a legacy of £500 and an annuity during his life of £50. I give to my brother *Montague Robert Tootal* an annuity during his life of £50. I give to my brother *Herbert Kennedy Tootal* an annuity during his life of £40. I give to my friend *Emma Allan* an annuity during her life of £25. I give to my friend *Charlotte Margaret Hankin* a legacy of £50 and an annuity during her life of £25. I give to my niece *Mary Cobbett Kilburn* a legacy of £50, and I give to my said niece the corpus or capital of the fund hereinafter directed to be set apart to answer the said annuity hereinbefore given to her uncle, the said *H. K. Tootal*, such corpus or capital to be paid or transferred to her when and so soon as such annuity shall cease." After giving other legacies she proceeded: "I direct my said trustees to set apart in their names sufficient funds to answer the

said respective annuities in real securities in *England* or on [here followed description of other investments]. I also direct my said trustees to set apart and invest in their names in one or more of the securities aforesaid the sum of £1000 to be held by them for the purpose of paying out of the income thereof any deficiency that may arise by any decrease in the income of the funds set apart to answer the said annuities, and subject thereto such sum of £1000 and the income thereof shall form part of my residuary personal estate, and the income not required for the purpose aforesaid shall, at the expiration of each year, be paid to my residuary legatee. I give the residue of my estate both real and personal, including the fund set apart to answer the said annuities (except the fund set apart to answer the annuity hereinbefore given to my brother *Herbert Kennedy Tootal*), when and so soon as such annuities shall respectively cease, to my brother *John Broadhurst Tootal*, his heirs, executors, administrators, and assigns respectively, absolutely."

The estate was administered in this suit, and the residue, after payment of costs, was little more than enough to pay 5*s.* in the pound on the legacies and the values of the life annuities.

By an order, dated the 22nd of July, 1872, made in Chambers on further consideration, it was ordered that the residue should be apportioned among the legatees and annuitants in proportion to their legacies and annuities respectively, and the amounts certified, and for the purpose of such apportionment it was ordered that the values of the abated annuities respectively should be ascertained as at the death of the testatrix, and that the amount of legacy duty should be ascertained, distinguishing how much was payable in respect of each legacy and annuity, and that the total amount of such duty should be transferred to the account of the Receiver-General of Inland Revenue, and that out of the ultimate residue the amounts which should be apportioned to the legatees respectively should be paid to them respectively, or to their respective legal personal representatives. "And that thereout also so much thereof as shall be apportioned in respect of the said annuities respectively (the respective amounts thereof to be verified by affidavit) be laid out in the purchase of Bank £3 per Cent. Annuities in the name of the Accountant-General, in trust in the said matter and cause, 'The account of *Alfred Dowley Tootal's* annuity,' 'The account

C. A.
1876
In re TOOTAL'S ESTATE.
HANKIN *v.* KILBURN.

of *Montague Robert Tootal's* annuity,' &c.; and that the interest to accrue during the lives of the several annuitants, *A. D. Tootal, M. R. Tootal, E. Allan,* and *C. M. Hankin,* be, until further order, paid to the said *A. D. Tootal, M. R. Tootal,* &c., or to their respective legal personal representatives."

Statement.

An apportionment was accordingly made taking the present value of each annuity at the death of the testatrix, according to the age of the annuitant, and the sums thus apportioned to the annuities were invested pursuant to the order. The fund thus set apart in respect of *Montague Robert Tootal's* annuity was the sum of £218 3*s.* 2*d.* consols.

In January, 1875, *Montague Robert Tootal* died, and *John Broadhurst Tootal,* the residuary legatee, thereupon applied to have this fund paid out to him. The summons was adjourned into Court, and came on to be heard before Vice-Chancellor *Bacon* on the 11th of January, 1876.

Kay, Q.C., and *Watson,* for *J. B. Tootal,* referred to *Bethune* v. *Kennedy* (1), *Mills* v. *Brown* (2), and *Baker* v. *Baker* (3).

Sir *H. Jackson,* Q.C., and *Procter, contrà,* referred to *Howe* v. *Earl of Dartmouth* (4), *Farmer* v. *Mills* (5), and *In re Lyne's Estate* (6).

Judgment, V.-C. B.

BACON, V.C.:—

The first question presented to me is on the construction of the will. The words of the will are very plain. There is a direction to the trustees to invest and secure a sum of money sufficient to pay annuities to persons named. Nothing can be more specific in its nature than that direction. If the testatrix had had a certain sum sufficient for the purpose standing in her name in the books of the *Bank of England,* and had directed the requisite portion of that sum to be invested by trustees to answer the annuities, it could not have been more specific. The testatrix contemplates the possibility of a decrease of income of the specific sum so set

(1) 1 My. & Cr. 114.
(2) 21 Beav. 1.
(3) 6 H. L. C. 616.
(4) 7 Ves. 137.
(5) 4 Russ. 86.
(6) Law Rep. 8 Eq. 482.

4 Jur. N.S. 491

apart, and she provides also that if that should not be required for the purpose of making up the deficiency, or not the whole of it, that that should sink into the residue, and then she disposes of the residue. And the residue is in general terms, but the generality is circumscribed, discriminated, and distinguished in the plainest terms that can be conceived by the expression she uses, "including the trust funds which I have set apart or directed my trustees to set apart for the purpose of satisfying the annuities." As matter of construction, if the estate had been sufficient, the argument could not have been sustained for a moment that the particular funds to satisfy the annuities were not specific. They are earmarked, distinguished, and stamped with a character that cannot be effaced from them. But then this happens, the testatrix has miscalculated the value of her estate, and it becomes necessary to file a bill in this Court to have the estate administered, but not without construing the will. The Court does not administer the estate with one hand, and construe the will with another hand at another time. The construction of the will must have been before the Court when the decree and order on further consideration was made, and although there is no word in it expressing a declaration of the Court as to the rights of the parties, there are words which plainly shew that the Court, in exercise of its authority, determines the rights of every party interested, because an abatement being necessary, the Court treats (as is done indeed in *Farmer* v. *Mills* (1)), the whole estate as one thing, and liable to satisfy the several bequests and specific legacies; though they are in their nature the gifts of those annuities, the Court makes no distinction for the purpose of apportioning between the specific annuities and the particular legacies, and it directs, having first provided for the payment of the costs and all other requisite payments and dealings with a clear estate, an apportionment between the legatees properly so called and the annuitants, who are also legatees in proportion to their several interests as described by the will, and it directs that while the annuities should subsist the income of the funds apportioned should be paid to those annuitants, and there it stops, and there is an end of it. If it had been the intention of the Court to construe the will in the manner it

(1) 4 Russ. 86.

C. A. 1876 *In re* TOOTAL'S ESTATE. HANKIN *v.* KILBURN. Judgment, V.-C. B.

has been suggested would have been its duty, it would have reserved the rights of the legatees and other persons to apply after the death of the annuitants, but there is no such word or meaning in the will. What is done is done once for all. The rights of the annuitants are ascertained, the rights of the legatees are satisfied. If after the lives of the annuitants those payments which are directed are brought to an end, any other persons have a right to apply. Let them apply. It is impossible, in my opinion, to read the will and to doubt the construction; and if there were any doubt upon the subject, I think that is covered by the decree on further consideration. The Court is open to no such reproach as would otherwise be directed against it if it had left a question like this which is now raised to be decided on some future occasion. The cases that have been referred to (*Mills* v. *Brown* (1) and *Bethune* v. *Kennedy* (2)) are plain and distinct authorities that a gift is not less specific because it is mixed up in the residue, and the words which the testatrix uses here, having first provided for the specific apportionment and security of the fund to produce the annuity, are: "I give the residue of my estate, including the fund set apart to answer the said annuities." Upon the whole, I entertain no kind of doubt, either upon the construction of the will or on the effect and operation of the order on further directions, that the residuary legatee is entitled to the fund which, by the decree on further consideration, had been set apart to answer the annuity of the gentleman who has died.

C. A.

The representative of the deceased annuitant, *Montague R. Tootal*, appealed, and the appeal came on to be heard on the 27th of March, 1876.

Argument.

Sir *H. Jackson*, Q.C., and *Procter*, for the Appellant:—

The Vice-Chancellor relied on *Farmer* v. *Mills* (3), but that case is really an authority in our favour. The residuary legatee cannot take anything till the annuitant has been paid his annuity in full. The words "including the fund," &c., are merely words added *ex abundanti cautelâ*, and cannot be held to make the gift

(1) 21 Beav. 1. (2) 1 My. & Cr. 114.
(3) 4 Russ. 86.

to *Montague Tootal* a gift of a life interest in a fund, with remainder over. According to that view, if the annuitant had died in the life of the testatrix, the residuary legatee could have claimed an apportionment as against other legatees; whereas it is clear that the directions to set apart the fund would fail of effect. In *Eales* v. *Drake* (1) the legatees had not so strong a case as ours.

Kay, Q.C., and *Watson*, for the residuary legatee:—

On the terms of this will we say that nothing is given to the annuitant but a life interest in a particular fund, and that he cannot claim anything more, the fund being given in remainder to the residuary legatee: *Croly* v. *Weld* (2); *Bethune* v. *Kennedy* (3); *Mills* v. *Brown* (4); *Baker* v. *Baker* (5); *Scott* v. *Salmond* (6).

JAMES, L.J.:— Judgment, C. A. James, L.J.

I think this case free from difficulty. The order on further consideration, in the first place, rightly directed the life annuities to be valued. That went on the assumption that there was no case of gift over, and so is unfavourable to the Respondent. A pecuniary legatee, or an annuitant, must be paid in preference to the residuary legatee, who can take nothing till all the legatees and annuitants have been paid in full. It is true that a gift may be so worded as to make the annuitant tenant for life of a fund, the corpus being given over on his decease; but it is impossible to put such a construction on a gift of the residue, "including the fund set apart to answer the annuity." To say that what is included in the residue is something else than residue is contradicting the plain terms of the will. The residuary legatee is entitled to nothing till the annuitants have been paid in full. This summons, therefore, must be dismissed. It will have to be considered what ought to be done as to the order on further consideration, which is erroneous in valuing *Herbert Tootal's* annuity

(1) 1 Ch. D. 217.
(2) 3 D. M. & G. 993.
(3) 1 My. & Cr. 114.
(4) 21 Beav. 1.
(5) 6 H. L. C. 616, 622.
(6) 1 My. & K. 363.

C. A. 1876 — *In re* TOOTAL'S ESTATE. — HANKIN *v.* KILBURN.

simply as a life annuity, without any regard to the gift over of the corpus set apart to produce it.

Mellish, L.J.

MELLISH, L.J.:—

The only question is whether, on the death of the annuitants, the funds set apart for securing their annuities fall into the residue, or are given to the residuary legatee as pecuniary legacies. The testatrix says plainly that they are included in the residue.

Baggallay, J.A.

BAGGALLAY, J.A.:—

I agree, and will only add that in *Baker* v. *Baker* (1) the Lord Chancellor went on the difference between a residuary legatee and a remainderman.

Solicitors: *R. Miller & Wiggins; Henry P. Cobb.*

C. A. 1875 V.-C. B. *Nov.* 30; *Dec.* 7. C. A. 1876 *March* 27.

ATTORNEY-GENERAL *v.* CORPORATION OF SUNDERLAND.

[1875 A. 46.]

Public Walks and Pleasure-Grounds—Public Health Act, 1848, *s.* 74—*Library—Museum—Conservatory.*

In 1864, a municipal corporation, as local board of health, purchased under the *Public Health Act*, 1848, s. 74, a piece of land of about ten acres to be added to a public garden of fifteen acres. In 1875 the corporation determined to appropriate about a quarter of an acre at one extremity of this piece of land as a site for the erection of town buildings, and of a museum, public library and school of art, and conservatory:—

Held, by *Bacon*, V.C., that no portion of the land could be appropriated for any of these objects, except the museum and conservatory:

Held, on appeal, that the erection of a free library was also allowable, as being conducive to the better enjoyment of the public walks and grounds as such.

Statement.

MOTION FOR DECREE.

In the year 1844 the corporation and certain inhabitants of *Sunderland* applied to the Treasury for a grant of money for purchasing a park or public recreation ground for the inhabitants of

(1) 6 H. L. C. 616. 4 Jur. N.S. 491

the borough, and in answer were informed that their Lordships approved of the proposed plan, and were prepared to make a grant of £750 for the purpose on the usual conditions, viz., "that the money will be issued if the ground when purchased is legally and permanently saved as a place of recreation for the people."

The grant having been made, a piece of land containing about fifteen acres was purchased in 1853, and in the purchase deed the corporation covenanted that the land "shall be used only as and for public walks or pleasure-grounds for the use of the inhabitants of the borough of *Sunderland*, and that no messuage or other buildings shall hereafter be erected thereon other than the walls or seats, or summer-houses, or any building or buildings for a museum, or other public purpose of a like nature, or for the abode of the parties attendant upon and connected with such walks, pleasure-grounds, and buildings, but no part of the said lands and hereditaments shall be used as a cemetery or burial-ground, nor shall any school, prison, penitentiary, hospital, or lunatic asylum, or the like, be built on any part thereof." This land was laid out as a park accordingly.

In 1863, about ten and a half acres of land adjoining the above-mentioned park were offered to the corporation by the *North Eastern Railway Company* for the sum of £10,000. The corporation, being the local board of health in *Sunderland*, determined that it was desirable to purchase this land as an addition to the park, and on the 13th of April, 1863, made a formal application to the Home Secretary for his approval of a proposal "to purchase the ground and to maintain, lay out, and plant it as public walks and pleasure-grounds, as an addition to and extension of the present park, in accordance with the 74th section of the *Public Health Act*, 1848." This application was made under the *Borough of Sunderland Act*, 1851, with which was incorporated the *Public Health Act*, 1848, the 74th section of which latter Act authorizes local boards of health, with the approval of the general board, to provide public walks and pleasure-grounds.

On the 12th of August, 1863, the Home Secretary returned an answer which, after referring to the application and the report of an inspector on the matter, proceeded as follows:—

"Now, therefore, I having made inquiry into the said applica-

C. A. 1876

ATTORNEY-GENERAL v. CORPORATION OF SUNDERLAND.

Statement.

tion, do hereby under my hand sanction the purchase (by the said corporation as acting as such local board of health) of land as described in the aforesaid application and report for the extension of the existing *Sunderland Park* under the powers and authority of the *Public Health Act*, 1848, incorporated in the *Borough of Sunderland Act*, 1851; and I do hereby further sanction their borrowing at interest the sum of £11,000 to defray the cost of such purchase, and laying out the said land for the aforesaid purpose, on the credit of the *Sunderland* district rates."

The land was accordingly purchased and conveyed by a deed of the 1st of April, 1864, which declared that the land was to be used "only" for public walks and pleasure-grounds. Soon afterwards the newly purchased grounds, with the exception of about a quarter of an acre at their north-eastern extremity, were laid out as pleasure-grounds and thrown into the old park. The land was purchased and laid out by means of £11,000 borrowed on the security of the general district rates.

In 1875 the corporation resolved to employ this quarter of an acre as a site for the erection of town buildings, including accommodation for museum and library and public offices; and on the 8th of April an advertisement was issued for plans, specifications, and estimates for the erection of a council chamber and offices, museum and library, on this land.

The information was filed in May, 1875, at the relation of three inhabitants and ratepayers of *Sunderland*, praying that the corporation might be restrained from appropriating any portion or portions of the park "as sites or a site for the erection of any town buildings or for any erection or building which is not needed for or incidental to the maintenance of the said parks as public walks or pleasure-grounds."

The cause came on for hearing before Vice-Chancellor *Bacon* on the 30th of November, 1875.

At the hearing it was admitted that part of the plan of the corporation was to erect a winter garden or conservatory, and to establish a school of art as well as a library.

Argument.

Kay, Q.C., and *Caldecott*, for the information:—

The Defendants will rely on the *Public Libraries Act*, 1855,

(18 & 19 Vict. c. 70), which (sect. 18) empowers the council of a borough to appropriate any lands vested in them, and thereon to erect "any buildings suitable for public libraries or museums, or both, or for schools for science or art." These words cannot include a council chamber or offices. If they do, they may be extended to the erection of a town hall.

Even for a public library, a museum, or a school of science or art, they do not warrant the appropriation of lands already impressed with a trust for specific public purposes; in short, of charity lands.

The approval of the Treasury required by the last-mentioned section has not been obtained.

Sir *H. Jackson*, Q.C., and *Owen*, for the Defendants:—

The question is simply one of law: is this piece of land, or is it not, affected with a trust which prevents its being employed in the manner proposed by the corporation?

We say, first, there has been no dedication of the land in trust for the purposes of a park only; secondly, whatever dedication there might have been was subject to the discretion of the corporation, acting for the public benefit; and thirdly, that the proposed buildings were not inconsistent with the purposes of a park.

As to the first point, when the declarations of trust in the deeds of conveyance are relied on, it must be borne in mind that the language of the Treasury minute of 1844 is much more ample. The effect of that minute is to give a discretion to the corporation, who are, in fact, no other than a committee of the ratepayers generally. The land is to be used as "a place of recreation" for the people, but the time, the situation, and the manner of such recreation are left to the decision of the ratepayers.

We do not say that express authority is to be found for the proposition, that land vested in a corporation for the purpose of a public park may be used for building a town hall; but we say that corporations generally are empowered by statute to do by circuity what this corporation is now proposing to do, and hence that the Court will not interfere with their doing it directly.

As a local board the corporation are bound to supply themselves

C. A. 1876 ATTORNEY-GENERAL v. CORPORATION OF SUNDERLAND. Argument.

with offices; for that they are obliged to buy land; and they may sell surplus land. Suppose this had been treated as surplus land, the corporation might have sold it. Can they not, then, appropriate it, and build on it a council chamber and offices? They certainly can build a museum. Will the Court, in the absence of bad faith, interfere?

By the 35th section of the *Public Health Act*, 1848 (11 & 12 Vict. c. 63), the local board must "provide and maintain" necessary offices. By the 35th section of the *Labouring Classes Lodging Houses Act*, 1851 (14 & 15 Vict. c. 34), the council, or the local board, may "appropriate" for the purposes of the Act, in the borough or district, any lands vested in them respectively. The 33rd section of the *Literary and Scientific Institutions Act*, 1854 (17 & 18 Vict. c. 112), defines the institutions to which the Act applies. The word includes institutions for the promotion of science, literature, and the fine arts, libraries, and public museums; and the powers of the council or of the local board to appropriate land for the purposes of the *Public Libraries Act*, 1855 (18 & 19 Vict. c. 70), are defined by the 18th section, which has been referred to. Again, by sect. 22 of the *Local Government Act* (1858), *Amendment Act*, 1861 (24 & 25 Vict. c. 61), local boards have the same powers with regard to any lands purchased by them, under or for the purposes of the *Local Government Act*, 1858, or any Act incorporated therewith, which they then had with regard to lands purchased for the making or enlarging of streets, under the powers of the Act; and by sect. 73 of the *Public Health Act*, 1848, the local board may, for the purpose of widening and improving streets, purchase "any premises," and re-sell any which may not be wanted for these purposes.

Our contention is, that this land may be treated as surplus land, and as such may be dealt with in the way proposed.

We admit the corporation have not the approval of the Treasury, as required by the 18th section of the *Public Libraries Act*, 1855; but it is not said that the corporation will not get such approval if they seek it.

The general result of all the above legislation is to give to a corporation powers to utilize for public purposes, in the way they think proper, the lands which they have.

We say then, firstly, the relators have not made out such a trust as the Attorney-General will succeed in enforcing, inasmuch as the corporation are not acting in bad faith; and, secondly, the Secretary of State's memorandum shews that the land was vested in the corporation for the good of the inhabitants at large, and the decision of what is good for the inhabitants rests with the rate-payers.

Argument.

But, thirdly, is this appropriation an alienation of the land from the purposes for which the trust was created? We say it is not; but if the Court should think that the mayor's parlour and the municipal room were not within the purposes for which the land is vested in the corporation, we ask the Court to let the injunction go as to these, and not as to the rest.

Judgment, V.-C. B.

BACON, V.C. (after some preliminary observations), continued:—

It is plain that these lands were vested in this corporation for a public purpose. It has been argued over and over again that a discretion was given to the corporation. But more than ten years ago this land was granted to be used "only as and for public walks or pleasure-grounds for the use of the inhabitants of the borough;" and that trust has been executed by the corporation ever since.

Acts of Parliament have been referred to, which give very extensive powers to corporations. They give, amongst other things, powers to build offices; but they do not give powers to build offices upon other people's land, or to take other people's land for that purpose.

Now, these lands have been made into a park, which is intended only for the recreation and healthful exercise of the people of *Sunderland*. It has been argued that these statutes may, by a circuity, be brought round to give to the corporation power of constructing buildings for other purposes, provided such purposes are not inconsistent with public use and benefit. But I am of opinion that buildings which are intended for purposes not connected with public walks or pleasure-grounds are plainly unlawful.

As to the museum and conservatory, it is a totally different thing. I think the building of a museum is entirely within the

C. A. 1876 — ATTORNEY-GENERAL v. CORPORATION OF SUNDERLAND.

original trust. Such a building may be erected on any suitable spot within the discretion of the Defendants. This the corporation are able to do; but they are not able to transport their municipal offices to the park from some other portion of the town of *Sunderland.*

Judgment, V.-C. B.

There will be an injunction, therefore, to restrain the Defendants from erecting any municipal or other building on the park, except a museum or conservatory. I am also against the Defendants in the matter of the erection of a library and school of art.

The corporation must pay the costs of this suit.

A decree was accordingly made restraining the corporation from appropriating any part of the park as a site for the erection of any town buildings, or any erection or building which erection or building should not be needed for or incidental to the maintenance of the said park as public walks or pleasure-grounds, other than a museum or conservatory, and from applying any rates to any such prohibited purposes.

C. A.

The corporation appealed, and the appeal came on for hearing on the 27th of March, 1876.

Argument.

Sir *H. Jackson*, Q.C., and *Owen*, for the Appellants:—

The corporation, in a reasonable exercise of their discretion, thought that it was not advisable to make this quarter of an acre part of the park.

[MELLISH, L.J.:—But they could not, under the powers of the Act under which they purchased, purchase land for a town hall.]

A conservatory, a free library, and a museum, are conducive to the enjoyment of the park as public walks or pleasure-grounds. The statute 18 & 19 Vict. c. 70, s. 18, authorizes the application of part of the ground as a site for a public library.

Kay, Q.C., and *Caldecott*, for the information:—

The statute 18 & 19 Vict. c. 70, s. 18, cannot apply to land vested in a corporation on a special trust. The case must turn on sect. 74 of the *Public Health Act.* We do not object to the con-

servatory, but we say that a museum and library are not within the clause.

[MELLISH, L.J.:—Nobody would say that land could be bought under that section simply for the purpose of a museum and library; but may they not be proper and valuable accessories to public walks and grounds?]

Argument.

We submit that the object of the Act is to provide open air walks for people in towns. If buildings had been intended they would have been mentioned. There are other Acts providing for museums and libraries requiring special sanction to the purchase of land for them. The object of the Act is to keep the land open, and no building, except a building fairly incidental to a garden, should be allowed. A library is still more objectionable than a museum—the latter may in some sense be called a public walk, but a library is in no sense such.

JAMES, L.J.:—

Judgment, C. A. James, L.J.

As regards the first point decided by the Vice-Chancellor, I am of opinion that the order is clearly right, the corporation having no more authority to use any of this land as the site of a town hall than to use it for erecting shops. The original park was appropriated as "a place of recreation," and, according to the Act under which the land now in question was acquired, it must be used "as public walks or pleasure-grounds." These words are not to be construed too narrowly. It is admitted by the information that some buildings are allowable, and the prayer is, as it seems to me, quite correct. The corporation is in the position of a trustee, and the question is whether, in building a museum and library, it is improperly executing the trust. The primary object of the trust is to provide a place of enjoyment and recreation; nothing is improper which conduces to that object, and we ought not to quarrel with anything which the corporation in a reasonable exercise of their discretion consider conducive to it. It is admitted that the erection of a conservatory is allowable, and it is an erection which you would expect as a matter of course to find in first-rate pleasure-grounds. The erection of a free museum containing botanical

C. A. 1876 ATTORNEY-GENERAL v. CORPORATION OF SUNDERLAND. Judgment, C. A.

specimens and other curiosities appears also to be unobjectionable. A library into which people may turn if the weather becomes unfavourable also seems allowable if *bonâ fide* intended for the use of persons frequenting the grounds, as it will tend to promote the convenient use of the grounds. I think, therefore, that the exception in the order ought to be extended, so that the erection of a free library may not be prohibited.

Mellish, L.J. MELLISH, L.J.:—

I am of the same opinion. The question is whether the corporation is guilty of a breach of trust in employing any part of this ground for purposes other than those mentioned in the information. I am of opinion that the ground was purchased for the purposes of the *Public Health Act*, sect. 74, and can only be applied for such purposes as are authorized by that Act. I am of opinion, therefore, that no part of it can be used as the site of a town hall and offices. Can, then, any part of it be applied as a site for a museum, library, and conservatory? If the corporation were to acquire land for those purposes only, I think that such a purchase would not be within the Act; but public walks and pleasure-grounds having been laid out on a piece of land containing twenty-five acres, it is proposed to apply a quarter of an acre for the erection of those buildings. The question then arises whether this application of a small portion of the ground is not reasonably incidental to the main object, and whether it will not improve the grounds in their character of public walks and pleasure-grounds. I am of opinion that it will, for it will increase the enjoyment of persons who go to walk there, and may induce more persons to frequent the grounds. I think that we ought not to put a narrow and strict construction upon the words, but that we ought to see whether the trustees, in what they are proposing to do, are *bonâ fide* carrying out the object of the trust.

Baggallay, J.A. BAGGALLAY, J.A.:—

I am of the same opinion. The land purchased from the railway company is vested in the corporation for the purposes mentioned

in the 74th section of the *Public Health Act*, 1848, and the corporation has power to use it in any way which will effectuate those purposes. The purposes of the section are that the land should be used for public walks and pleasure-grounds, and I should much regret to be obliged to hold that applying a small portion of it for a museum, library, and conservatory, was inconsistent with this purpose. I cannot conceive anything more likely to conduce to the enjoyment of the walks and pleasure-grounds than the having these erections attached to them, and I agree with the Lords Justices that the order should be varied to the extent mentioned. But we only remove the prohibition as to using the land for the site of these buildings; we say nothing as to the funds out of which the expenses of their erection are to be paid.

The decree as varied restrained the Defendants from appropriating any portion of the park as a site for the erection of any town buildings, or for any erection or building which should not be needful for or incidental to the maintenance or use of the parks as public walks or pleasure-grounds, the injunction not to extend to a free public library, museum, or conservatory, open for the use, convenience, and recreation of the persons frequenting such walks and pleasure-grounds.

Solicitors: *Shum, Crossman, & Crossman; Bell, Brodrick, & Gray.*

Distinguished. WESTMINSTER AIRWAYS, LTD. *v.* KUWAIT OIL CO., LTD. [1950] 2 All E.R. 596.

C. A.
1876
M. R.
March 11.
C. A.
March 29, 31.

ANDERSON *v.* BANK OF BRITISH COLUMBIA.

[1875 A. 107.]

Production of Documents—Privileged Communication—Letter from Agent to Principal.

A bill was filed against a banking company to compel them to replace a sum of money alleged to have been improperly transferred by them from one account to another at their branch bank in *Oregon*. Before the bill was filed, but after litigation had become highly probable, the manager in *London* telegraphed to the manager in *Oregon* to send full particulars of the whole transaction. On an application by the Plaintiffs in the suit for production of documents, the bank resisted production of the letter sent in answer, as being privileged:—

Held (affirming the decision of the Master of the Rolls), that the letter was not privileged, and must be produced.

Ross v. *Gibbs* (1) explained.

Under the Judicature Acts the right to discovery is regulated by the rules previously existing in the Court of Chancery.

Statement.

THIS was an appeal by the *Bank of British Columbia* and *H. E. Ransom*, their manager, from an order of the Master of the Rolls directing production of a letter dated the 16th of November, 1874. The general nature of the case made by the bill filed on the 7th of October, 1875, was as follows:—That the Plaintiffs, *Anderson & Co.*, of *London*, and *William Guild & Co.*, of *London*, and the Defendants, *Laidlaw & Gate*, of *Portland* in *Oregon*, were jointly interested in an adventure for bringing wheat from *America* to *Europe;* that the *British Bank of Columbia* was an English bank, having a branch at *Portland*, in *Columbia*, and acted as the banker of *Laidlaw & Gate;* that moneys belonging to the adventure were placed to a separate account, "*Laidlaw & Gate, London* account," with the *Portland* branch, and that the bank knew the nature of the title to these moneys; that *Laidlaw & Gate*, being indebted to the bank, transferred in December, 1873, the balance to their own private account, in part satisfaction of the debt, and also about the same time gave the bank a security on a cargo of wheat belonging and known by the bank to belong to the adventure, which cargo was shipped on board the *Melancthon*, and afterwards

(1) Law Rep. 8 Eq. 522.

sold by the bank; that the adventure resulted in a loss, and that the Plaintiffs, as between themselves and *Laidlaw & Gate*, were entitled to the moneys thus received by the bank, amounting to £4328. The bill prayed that the transfer to the private account of *Laidlaw & Gate*, and the mortgage of the wheat, might be declared fraudulent and void as against the Plaintiffs, and for repayment by the bank.

On the 11th of November, 1874, Mr. *Ransom*, as manager of the bank, had received from the Plaintiffs' solicitors a letter demanding repayment of the above sum, which letter concluded as follows:—"We understand that this matter has already been the subject of discussion at your board, and we shall be obliged by your informing us whether it is the intention of the bank to repay the moneys to our clients, or whether they are to be driven to litigation to obtain them; and, in the latter case, we must ask you to refer us to your solicitors, to whom we may send process in the suit which we are instructed to commence." About the same time the Plaintiff *Anderson* had an interview with *Ransom* on the subject. *Ransom* deposed as follows:—"On perusing the above letter, and considering what had passed at the interview with the Plaintiff *A. G. Anderson*, I observed that litigation was imminent, and I felt that it was essential that the bank should have the benefit of legal advice, and that for that purpose there should be obtained from the other side the full particulars of all the facts and circumstances of the case likely to be required by the solicitor of the bank. I determined, therefore, at once to telegraph to Mr. *Russell* instructions for full particulars, and at the same time to request the attendance of the solicitor of the bank at the next meeting of the court of directors."

Mr. *Ransom*, accordingly, on the 14th of November, 1874, telegraphed to Mr. *Russell*, the branch manager at *Portland*, as follows:—

"Claims referred to letter 18 Sept. made for 25,000 dollars. Send by letter fullest particulars whole transactions, especially cargo *Melancthon* and copy of account."

The letter of the 16th of November, 1874, to which the present question related, was the letter written by Mr. *Russell*, in pursuance

C. A. 1876

ANDERSON v. BANK OF BRITISH COLUMBIA.

Statement.

of the above telegram, to Mr. *Ransom*, as general manager of the bank.

The usual order having been made for an affidavit of documents, *Ransom* and another officer of the bank made an affidavit, the second part of the schedule to which contained an entry of this letter and a number of other letters and documents. The deponents objected to produce the documents in the second part of the schedule, "on the ground that they are correspondence between the Defendants, the *Bank of British Columbia*, and their solicitors or agents, in reference to the subject of this suit, and documents prepared by their solicitors exclusively for the purposes of this suit, or with reference thereto, and are privileged."

A summons for production of this letter was adjourned into Court. The evidence of *Ransom* was given, to the effect stated above, as to the communications with him and his sending the telegram. The summons came on to be heard before the Master of the Rolls on the 11th of March, 1876.

Argument.

Chitty, Q.C., and *Kekewich*, for the bank:—

We say that a Defendant is entitled to claim privilege in respect of information obtained after a claim has been made by the Plaintiff, relating to threatened litigation, for the purpose of conducting the defence, even although it may not be obtained directly or indirectly through a solicitor or professional agent: also in respect of information obtained for the purpose of being communicated to a solicitor or professional adviser; and, at all events, that privilege may be claimed where such information is communicated confidentially. That such is the state of the law is shewn by *Greenough* v. *Gaskell* (1), *Reid* v. *Langlois* (2), *Curling* v. *Perring* (3), *Steele* v. *Stewart* (4), *Lafone* v. *Falkland Islands Company* (5), *Ross* v. *Gibbs* (6), *Woolley* v. *North London Railway Company* (7), *Cossey* v. *London, Brighton, and South Coast Railway Company* (8), *Skinner* v. *Great Northern Railway Company* (9),

(1) 1 My. & K. 98.
(2) 1 Mac. & G. 627.
(3) 2 My. & K. 380.
(4) 1 Ph. 471.
(5) 4 K. & J. 34.
(6) Law Rep. 8 Eq. 522.
(7) Ibid. 4 C. P. 602.
(8) Ibid. 5 C. P. 146.
(9) Law Rep. 9 Ex. 298.

Chartered Bank of India v. *Rich* (1). Here the letter in question was written in answer to the inquiries of the manager, and with a view to its being submitted to the solicitor of the bank, and is privileged.

Laing, for the Plaintiffs, was not called upon.

JESSEL, M.R.:— Judgment.

I am very much obliged to Mr. *Kekewich* for calling my attention in Chambers to the common law authorities. It is certain that they are cases that we ought to be acquainted with, and we ought to know how the authorities stand. I have no doubt that this document is not privileged.

The facts of the case are few and simple, and very well put. Some gentlemen considered that an account which they opened at a branch bank at *Oregon* had been improperly dealt with to their disadvantage, and they made a claim upon the *Bank of British Columbia*, who have a head office in *London*, and although they did not commence a suit, they sent a demand which looked very much like a suit if it was not complied with. Thereupon the general manager in *London* sent to the agent of the bank at *Oregon* for an explanation of what he had been doing with this account, and that is all. He sends for an explanation by telegram, of which the following is a copy :—" Claims referred to letter, 18th Sept., made for 25,000 dollars. Send by letter fullest particulars whole transactions, especially cargo *Melancthon* and copy of account." In answer to that telegram the letter is written which is sought to be protected, the letter containing the "fullest particulars," and there is not another word which appears to me material with respect to the transaction. The affidavit goes on to state this, that when he first saw the letter of the Plaintiff he observed—whatever "observed" may mean—"that litigation was imminent, and I felt it was essential that the bank should have the benefit of legal advice, and that for that purpose there should be obtained from the other side"—that is, from *Oregon*—"the full particulars of all the facts and circumstances of the case likely to be required by the solicitor of the bank. I determined, therefore,

(1) 4 B. & S. 73; 32 L. J. (Q.B.) 300.

C. A. 1876 ANDERSON v. BANK OF BRITISH COLUMBIA. Judgment, M.R.

at once to telegraph to Mr. *Russell*"—that is, the agent—"instructions for full particulars, and at the same time to request the attendance of the solicitor of the bank at the next meeting of the court of directors;" and, accordingly, he sent a telegram, and the solicitor attended the court of directors. Now, there is not a syllable there which shews that any communication, direct or indirect, expressed or implied, was made to the agent to the effect that his communication was to be a confidential one for the purpose of being submitted to the professional man—that is, the solicitor—for advice. If it had been so, I apprehend that it would have been protected upon principles well understood. If you ask your agent to draw out a case for the opinion of your solicitor, or for the opinion of your counsel, that is a confidential communication made for that purpose. Here there is nothing of the sort. Nor is it suggested or alleged that, without being requested, the agent did make the communication with the object of its being laid before the solicitor for advice. He therefore did not make it as a confidential communication in any other sense than that in which every communication from an agent to his principal, or from a sub-agent to the chief agent of the principal, is confidential. Every such communication, no doubt, is in a sense confidential, but not in the sense in which we call a communication to a professional man confidential. This communication, then, as regards the sender, was not made or sent for the purpose of being laid before a professional adviser, nor was there any intimation of such purpose sent by the person who required the communication. All that you have got is a statement of the person who sent the telegram as to the state of his feelings at a particular time, which is not sufficient for the purpose of the point I have to determine. I therefore feel no difficulty whatever in saying that this clearly was not a confidential communication made within the rule which protects confidential communications from discovery as regards the other side.

What is the rule, and what is the meaning of the rule? The meaning of the rule is, I understand, truly laid down by Lord *Brougham* in the case of *Greenough* v. *Gaskell* (1), and is thoroughly well explained, if I may use the phrase in reference

(1) 1 My. & K. 98.

to so great a Judge as Lord *Cottenham*, in the case of *Reid* v. *Langlois* (1), followed in every case in equity, not excepting the case before the Vice-Chancellor *Stuart*, in which a *dictum* has been strained to an extent which, if the Vice-Chancellor's attention had been drawn to it, I think, he would not have thought warranted. The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation. That is the meaning of the rule.

Now, as to the extent of the rule. It goes not merely to a communication made to the professional agent himself by the client directly, it goes to all communications made by the client to the solicitor through intermediate agents, and he is not bound to write letters through the post, or to go himself personally to see the solicitor; he may employ a third person to write the letter, or he may send the letters through a messenger, or he may give a verbal message to a messenger, and ask him to deliver it to the solicitor, with a view to his prosecuting his claim, or of substantiating his defence.

Again, the solicitor's acts must be protected for the use of the client. The solicitor requires further information, and says, I will obtain it from a third person. That is confidential. It is obtained by him as solicitor for the purpose of the litigation, and it must be protected upon the same ground, otherwise it would be dangerous, if not impossible, to employ a solicitor. You cannot ask

(1) 1 Mac. & G. 627.

C. A. 1876 ANDERSON v. BANK OF BRITISH COLUMBIA. Judgment, M.R.

him what the information he obtained was. It may be information simply for the purpose of knowing whether he ought to defend or prosecute the action, but it may be also obtained in the shape of collecting evidence for the purpose of such prosecution or defence. All that, therefore, is privileged.

Then the rule goes a step further. The solicitor is not bound any more than the client to do this work himself. He is not bound either to collect information or to collect testimony. He may employ his clerks or other agents to do it for him, and upon the same principle as the information acquired by himself directly is protected, so the information acquired by a clerk or agent employed by him is equally protected. But then the cases go still a step further. Suppose the information required is in a foreign country, where neither the solicitor nor his clerk nor an ordinary agent can obtain it, he may request the client to obtain it himself, and then the information so obtained by the client at the request or under the advice of the solicitor is in a sense obtained by the agent of the solicitor, although it is a very odd way of expressing it. It is turning the client, so to say, into the agent of the solicitor for the purpose of obtaining information; but it is clearly within the rule of privilege. So far as I understand, the cases in equity go no further. To shew that I am right in what I am stating it will perhaps be necessary to say a word or two as to the authorities.

In *Reid* v. *Langlois* (1) Lord *Cottenham* says this (2): "Now the argument turned on this, that although a party may communicate with his legal adviser, and that production of the documents arising out of that communication will be protected, yet if the message is sent through a third person in writing it is not protected. It is obvious that no such distinction as this can be maintained; the object is to protect the party who wishes to take the advice of professional men"—by which he means members of the legal profession. Our law has not extended that privilege, as some foreign laws have, to the medical profession, or to the sacerdotal profession. We know that in some foreign countries communications made to a medical man are privileged, upon the ground that it is as desirable that a man shall be perfectly free in his communication with

(1) 1 Mac. & G. 627. (2) 1 Mac. & G. 638.

his medical man as that he shall be free in his communications with his lawyer. That has not been recognised in this country. Again, in foreign countries where the Roman Catholic faith prevails, it is considered that the same principles ought to be extended to the confessional, and that it is desirable that a man should not be hampered in going to confession by the thought that either he or his priest may be compelled to disclose in a Court of Justice the substance of what passed in such communication. This, again, whether it is rational or irrational, is not recognised by our law. When Lord *Cottenham* says "professional men" he means members of the legal profession and nothing else—"and he would be prevented from taking such advice if there was the hazard of having it revealed on entering into a contest with an opponent." Then he goes on (1): "One, however, of the documents in question is a letter from the Defendant to Messrs. *Robinson & Brooking*, the agents, and there is no statement that it was communicated or sent to them for the purpose of being communicated to the solicitor. This, therefore, cannot be protected."

The case of *Steele* v. *Stewart* (2) has also been referred to—again a decision of a Lord Chancellor, Lord *Lyndhurst*. He says this, after referring to statements that the letters in question were written by a master of a ship to the Defendant *Stewart*, who lived at *Calcutta*, and his solicitors, and that they were written by the master to the Defendant and his solicitors while he was in *Calcutta* acting by their direction and as their agent in procuring evidence in support of an action: "It does not appear to me that there is any inconsistency in these statements. He might have been sent out by the Defendant for the purpose of collecting evidence on behalf of the Defendant at the suggestion and by the advice of the Defendant's solicitors, and might, in collecting such evidence, have acted under the direction and as the agent of the solicitors. The single question, therefore, is, whether letters written under these circumstances are privileged communications." The case came to be considered before Lord *Hatherley* when Vice-Chancellor *Wood*; this is only the Vice-Chancellor's decision, which is not so binding upon me as those of the Lord Chancellors, still it is a decision which has been universally recognised and followed.

(1) 1 Mac. & G. 639. (2) 1 Ph. 471, 474.

C. A. 1876 ANDERSON v. BANK OF BRITISH COLUMBIA. Judgment, M.R.

It took place in the year 1857, and I, for one, will not depart from it. In *Lafone* v. *Falkland Islands Company* (1) he says, after quoting the case of *Steele* v. *Stewart* (2): "It seems to me that the principle there laid down by Lord *Lyndhurst* is that the true test is not whether the person who is at a distance and communicates the information in question is the agent of the solicitor and sent out by the solicitor, or the agent of the Defendant and sent out by him; as Lord *Lyndhurst* there says, he may have been sent out by the Defendant, and yet, in collecting the information, he may have acted under the direction and as the agent of the solicitor;" —as I said before, that is rather a refined sense—"but the true test is, whether such person, in transmitting that information, was discharging a duty which properly devolved upon the solicitor, and which would have been performed by the solicitor if the circumstances of the case had admitted of his performing it in person;" in other words, if a solicitor asks the client to send somebody to collect information, it is the same thing as if the solicitor himself had written to a person in foreign parts asking for information.

Now, on the other hand, I have been referred first of all to a case before Vice-Chancellor *Stuart* of *Ross* v. *Gibbs* (3). The Defendant had despatched a Mr. *Gibbs*, a non-professional person, to *Spain*, to collect evidence. The privilege as claimed was this: "a bundle of letters from *Joseph Hucks Gibbs*, the special agent of Messrs. *Gibbs & Son*, sent by them to *Spain* to consult with their legal advisers there, and to report thereon, and to obtain evidence for the said Messrs. *Gibbs & Son* in this suit, and in the suit of *Gibbs* v. *Ross*, written by the said *J. H. Gibbs* to Messrs. *Gibbs & Son*." As I understand, the Vice-Chancellor considered that *Gibbs* was sent out to consult their legal advisers and to act under their direction in collecting evidence, and if so, the point was the same as that decided in *Steele* v. *Stewart* and *Lafone* v. *Falkland Islands Company* (4). This is not stated quite so distinctly as it might have been, but it is to be collected from what the Vice-Chancellor said. He says: "It is contended that unless the agent's communications are with a solicitor they are not privileged, but that

(1) 4 K. & J. 36.
(2) 1 Ph. 471.
(3) Law Rep. 8 Eq. 522, 524.
(4) 4 K. & J. 34.

notion is not countenanced by any principle or by any authority, except a *dictum* of Lord *Brougham* in the case of *Greenough* v. *Gaskell*" (1). He is there referring to the principle that the foreign agent employed by the solicitor may communicate to the client or to the solicitor, and that such communications are privileged, being the result of the solicitor's advice and direction. The fact that the agent you employ is in fact employed at the request and direction of your solicitor to obtain information for him brings a case within the rule. Then he says: "The privilege is that of the client, and information procured through an agent relative to litigation, and with a view to it, is as much protected on principle as if it was procured through a solicitor." That refers to information obtained under the advice and direction of the solicitor, for the Vice-Chancellor goes on to say: "In the case of *Reid* v. *Langlois* (2), Lord *Cottenham*, referring to the argument that the necessity of employing a third party can alone justify the privilege, says, 'There is no good reason, and I believe no authority, for a rule of this kind.'" Now you find Lord *Cottenham* expressly saying that it is the communications of a third person employed to communicate to the solicitor that are privileged. Therefore it is clear that when you see what the Vice-Chancellor is speaking of, and when you find him referring to *Reid* v. *Langlois*, he is not laying down any new law, but following simply the law already laid down. Then he goes on to say: "Communications with a professional, or even an unprofessional agent, in anticipation of the litigation, and with a view to the prosecution of a claim or a defence against a claim to the matter in dispute, being confidential, are privileged; communications of Plaintiffs and Defendants with their own professional advisers as to their own rights or title to the subject-matter of the suit, though made before the suit or before it was anticipated, are privileged." But the words "being confidential" govern the whole sentence, and confine it to confidential communications with a professional adviser; and in the next sentence he uses the term "their own professional advisers." I think the Vice-Chancellor, therefore, neither decided nor intended to decide anything beyond what had been previously decided by the authorities which were binding upon him.

(1) 1 My. & K. 98.
(2) 1 Mac. & G. 627.

C. A.
1876
ANDERSON
v.
BANK OF
BRITISH
COLUMBIA.
Judgment, M.R.

Then, on the other hand, I have been referred to some decisions by Judges of the Common Law Courts on this question. I do not intend to go through them in detail, for this reason: they all proceeded, as I understand, not upon the simple rule of equity, as to which there seems to have been some misunderstanding in the minds of those learned Judges—I say it with great respect—but upon the powers conferred on the Judges by the *Common Law Procedure Act*. It was put in one of the cases, especially by Mr. Justice *Blackburn*, that he did not consider, or they did not consider, that the rules of equity were binding upon them, but that they had a different power and a different discretion under the *Common Law Procedure Act*, and were entitled, if they thought fit, not to go so far as the Courts of Equity were in the habit of going. Similar statements appear in the judgment of Lord Chief Justice *Cockburn* in one of the cases. If that were so, those cases are now no authorities at all, because since the *Judicature Act* it must be taken to be conclusively settled by the Legislature that where there is any conflict between the rules of law and the rules of equity, the rules of equity are to prevail; and, consequently, even a tribunal composed of the same Judges as men, though not the same Judges in their character as Judges, since they are now Judges of the High Court, will be no longer governed by the clauses of the *Common Law Procedure Act*, if those clauses conflict with the rules of equity, but will be governed by the rules of equity; and it is for that purpose that I have referred merely to the equity decisions as my guide in disposing of this case.

I am, therefore, clearly of opinion that this document is not privileged.

C. A.

The bank and their manager appealed from this decision, and the appeal came on to be heard on the 29th of March, 1876.

Argument.

Chitty, Q.C., and *Kekewich*, for the Appellants:—

We contend that this letter is privileged as being a confidential communication to enable the directors to obtain legal advice.

[MELLISH, L.J.:—I apprehend that a letter written by an agent who was getting up evidence to be used at the trial would be privileged; but this is not like that.]

If the letter had been written by *Russell* spontaneously, the case would have been different; but he wrote it in answer to a telegram referring to the claim that had been made. If the information had been asked for expressly for the purpose of being laid before the solicitor, it would have been privileged: *Lafone* v. *Falkland Islands Company* (1); and all information obtained for the purpose of resisting threatened litigation stands on the some footing: *Greenough* v. *Gaskell* (2); *Reid* v. *Langlois* (3); *Ross* v. *Gibbs* (4); *Hooper* v. *Gumm* (5); *Cossey* v. *London, Brighton, and South Coast Railway Company* (6); *Chartered Bank of India* v. *Rich* (7); *Skinner* v. *Great Northern Railway Company* (8); *Fenner* v. *London and South Eastern Railway Company* (9); *Baker* v. *London and South Western Railway Company* (10); *English* v. *Tottie* (11); *McCorquodale* v. *Bell* (12). If *Ransom* had first gone to the solicitor, and the solicitor had said, "I cannot advise you till you have got further information from *Oregon*," and *Ransom* had then written to *Oregon*, he would have been acting as the solicitor's clerk, and the reply would, according to the authorities, have been privileged. That here the telegram was sent just before *Ransom* saw the solicitor makes no substantial distinction.

[MELLISH, L.J.:—The object here was, not to obtain evidence, but to learn what the facts were, in order to know whether the claim should be resisted. It seems to be an extension of the rule as to privileged communications to apply it to such a case.]

Hastings, Q.C., and *Laing*, for the Plaintiff, were not called upon.

JAMES, L.J.:—

Notwithstanding the great length of the arguments addressed to us, and the number of cases cited, I think that this is one of the clearest and plainest cases that have ever come before the Court;

(1) 4 K. & J. 34.
(2) 1 My. & K. 98.
(3) 1 Mac. & G. 627, 638.
(4) Law Rep. 8 Eq. 522.
(5) 2 J. & H. 602.
(6) Law Rep. 5 C. P. 146.
(7) 4 B. & S. 73.
(8) Law Rep. 9 Ex. 298.
(9) Ibid. 7 Q. B. 767.
(10) Ibid. 3 Q. B. 91.
(11) 1 Q. B. D. 141.
(12) 24 W. R. 399.

C. A.
1876
ANDERSON
v.
BANK OF
BRITISH
COLUMBIA.
Judgment, C. A.
James, L.J.

and according to all the cases decided ever since I have known the Court, and everything I have ever read about the practice of the Court, I think that this is a document which ought to be produced. The old rule was that every document in the possession of a party must be produced if it was material or relevant to the cause, unless it was covered by some established privilege. It was established that communications that had passed directly or indirectly between a man and his solicitor were privileged, and the privilege extended no further. It is now contended that that rule was entirely altered by an expression of the Vice-Chancellor *Stuart* in the case of *Ross* v. *Gibbs* (1). I am quite sure that the Vice-Chancellor did not intend, by a mere casual and hasty generalization not called for at all by the facts of the case, to depart from the whole tradition and course of this Court with respect to the production of documents. If the rule had been as was supposed to be laid down in that case, all that is said in text books by learned authors with regard to the origin of the principle, and with regard to the justification of the privilege—all that is said about its being confined to lawyers and not extending to doctors and priests—all that has been said by learned Judges in Chancery, in the particular circumstances of the cases that came before them, to shew how they might be brought within that general principle –the whole of that would be, to my mind, puerile nonsense if there had been that law which is supposed to have been laid down, that any communication made by a person with a view to litigation, whoever the person is, must be protected. As to the cases at law, it is not necessary to go through them, as they seem to have been brought, apparently now at least, very much into conformity with the principle of the cases in equity, and it is needless to go through them for the purpose of seeing whether in each of them, if the same state of circumstances came before the Court, the same decision would be arrived at. Looking at the *dicta* and the judgments cited, they might require to be fully considered, but I think they may possibly all be based upon this, which is an intelligible principle, that as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as the materials for the brief. But that seems

(1) Law Rep. 8 Eq. 522.

to me to have no application whatever to a communication between a principal and his agent in the matter of the agency, giving information of the facts and circumstances of the very transaction which is the subject-matter of the litigation. Such a communication is, above all others, the very thing which ought to be produced. Look at the circumstances of the present case. A man makes a claim against a bank in *London*, the bank in *London* not having all the facts in their knowledge, send out to their agent who transacted the business a telegram to this effect, "Give us the fullest information that you have of all the facts and circumstances of the case, all about the shipping document, and everything of the kind connected with it." That is exactly what they ought to do. It is the duty of a man, in the ordinary course of business, to do it, and it is not necessarily connected with the litigation either actually commenced or expected. It is the information of the agent, and the principal ought to know what the agent knows. The knowledge of the agent in the matter of the agency is, or ought to be, the knowledge of the principal; and even if, after the bill had been filed, the Defendant had said, when asked for discovery, "I do not know, all the knowledge is in the possession of my agent in *Oregon*," this Court would say, "That is no answer; it is your duty in making the discovery to use your best efforts *bonâ fide* to obtain all the information that your agent can give you, and, whether it is before or after litigation, you ought to write to him, if necessary, and get from him the information; and if you get the information, you must tell us what it is, so that we may know the exact facts and circumstances of the case." That being so, it is impossible to say that discovery of a document of this kind can be refused. The agent has sent to the principal the account, or we must assume that what the agent has sent in answer to the telegram is a statement of what took place between him and the other party. The other party says, "You have got that statement of facts, produce it; it shews what the facts are within your own knowledge, and is the best evidence of what you know as to what took place."

I am of opinion, therefore, upon the plainest principles on which discovery is given in this Court, this letter ought to be produced.

C. A. 1876 ANDERSON v. BANK OF BRITISH COLUMBIA. Judgment, C. A. Mellish, L.J.

MELLISH, L.J. :—

I am of the same opinion. The question depends upon the right to discovery, and although rule 11 of Order XXXI. of the Rules of Court, 1875, as to what documents ought to be discovered differs very little from a similar provision in the *Common Law Procedure Act*, yet, having regard to the general rule that the principles of equity are to prevail, there can be no doubt that the rules previously existing respecting discovery in the Court of Chancery are binding now upon all the Courts.

Then as to the question that we have to decide in this case —and I do not at all wish to go beyond what is necessary for the decision of the particular case before us—the question we have to decide is, whether a letter by a mercantile agent to his principal giving information respecting what the agent had actually done for and on account of the principal is to be privileged because it is sent in compliance with the request of the principal given after the principal has been threatened with litigation respecting the matter on which he requires information. I am clearly of opinion that such a communication is not privileged. To be privileged it must come within one of two classes of privilege, namely, that a man is not bound to disclose confidential communications made between him and his solicitor, directly, or through an agent who is to communicate them to the solicitor; or, secondly, that he is not bound to communicate evidence which he has obtained for the purpose of litigation. Now, in determining to what extent the latter privilege goes, and whether it is confined to cases where a solicitor is employed, or extends to cases where a man acts as his own solicitor, some very nice questions may arise, particularly when the evidence is not obtained for the direct purpose of being given in the action, but is obtained before the action is commenced or before the defence is pleaded, in order that the party who seeks it may obtain information for the purpose of determining whether he will defend the action, or whether he will commence an action. Now if the information is really and simply information obtained respecting the evidence which could be given by a person who is to be a witness, I do not think it is necessary to give any opinion on the present occasion whether that would be privileged

or not. Supposing a collision had taken place either at sea or on land, and a man before he determines whether he will bring an action or defend an action writes to a person and says, "Get me an account from all the passengers and crew what each man can say respecting this transaction, write it down as accurately as you can, and send it up to me"—it might be that that would be privileged just as much if he sent and asked for it before he determined whether he would bring an action or defend an action as it would be if it was sent after the action was commenced, and he wished to obtain information as to what evidence such persons would probably give. He may say, "If the other side want the information, they may go to the same persons and ask them themselves what evidence they will give; and if they will only inform one side what the evidence may be and not the other, that is his misfortune." As a general rule, it may be he is not bound to give the discovery respecting that, but I cannot think that that ought to be held to apply to information which a principal asks his agent to give respecting the matters which the agent has done for and on account of the principal. That is information respecting matters which in point of law are the acts of the principal himself, and it is information respecting matters as to which the knowledge of the agent is the knowledge of the principal. In point of law, the principal is to be deemed to have known the facts before he has actually got personal information about them. I cannot but think that, as you are entitled to ask the principal what he knows respecting those facts, you must necessarily be entitled to the information which his agent has sent respecting them. As I have observed during the course of the argument, I cannot conceive that there is any distinction between written communications by an agent to his principal, and verbal communications by an agent to his principal; and for the Defendant in this case to refuse to produce this letter, is, it seems to me, the same thing as if a principal, when asked a question respecting anything which had happened in his own office as to some matter of business which had not been actually transacted by himself, was to say in answer, "I do not know personally how this was done; the only information I have respecting it is

C. A. 1876 ANDERSON v. BANK OF BRITISH COLUMBIA. Judgment, C. A. Mellish, L.J.

the information I have obtained from my clerks and servants, and my clerks and servants gave me that information in consequence of questions which I put to them after I was threatened with an action." It cannot for a moment be supposed that such an answer would be a sufficient excuse for not giving the discovery asked for. It appears to me, even if we had a discretion to say what was just and right, that it would be a decision very detrimental to the purposes of justice to say that such communications were privileged. In fact, practically, we should be depriving a man of the benefit of discovery in a great many cases. So far from saying that this letter ought to be privileged because it comes from the other side of the world, that is really a reason why it is more important that it should be discovered. Anybody who is at all aware of the practice at common law in mercantile cases must know the extraordinary inconvenience, delay, and expense which take place on account of commissions having to be sent abroad to prove facts and obtain evidence respecting which there is no real doubt and no real dispute whatever, and the necessity for sending out such commissions would be enormously increased if we were to hold that principals are not to be bound to discover the information which they have received from their agents. If both parties are bound to discover the information they have respectively received from their agents, then, in all human probability, in a great many cases the facts will be perfectly ascertained without any difficulty, and nothing will remain but the question of law as to whether the Plaintiff is or is not under the circumstances entitled to recover from the Defendants.

The question before us is a strong instance of this. Here is a transaction that took place with the *Bank of British Columbia* by their agent out in *Oregon*. Of course the person, whoever he may be, who may be made a defendant for the purpose of discovery, will not know of his own knowledge what took place out in *Oregon*. The books are all out in *Oregon*, and if it is necessary to wait until somebody goes and examines the books in *Oregon*, nobody can tell what the extent of the delay and expense may be. If the matters had happened in *London*, so that you could bring before the Court the man who knew the facts in *London*, and who was the person

to give the discovery, there would not be the slightest doubt that he would be bound to make the discovery and produce the books. Why should there be a less right to discovery because this took place in *Oregon*, and because the information is contained in a letter sent by an agent in *Oregon* to his principal in this country? It appears to me as a matter of principle, looking at what is right and just, and for the purpose of saving expense, and enabling the truth to be discovered, it is in the highest degree desirable that such a discovery should be afforded.

Judgment, C. A. Mellish, L.J.

I am, therefore, clearly of opinion, in accordance with the practice that has prevailed in Courts of Equity before the Judicature Acts, and I should say in accordance with what I think is just, right, and expedient, if we are simply to take the rule as we find it laid down in the Order and interpret it, that this discovery ought to be made.

BAGGALLAY, J.A.:—

Baggallay, J.A.

I am of the same opinion. The bill in this case asserts a claim based upon a transfer by the Defendants, the banking company, at their branch in *Oregon*, of a balance from the *London* account of *Laidlow & Gate* representing a joint adventure to the private account of the same parties. Whether that claim is well or ill founded depends upon the particular circumstances of the case, all which circumstances are within the knowledge of the manager of the banking corporation in *Oregon*. Some ten months before the bill was filed, and at a time when it would appear from the affidavits that litigation in respect of this matter was very probable, a telegram had been sent from the *London* bank to the *Oregon* manager requesting him to send the fullest particulars of the transaction. Now if the Defendant in this case, instead of being a banking company, had been an individual banker, and his business either in *London* or *Oregon* had been carried on under his own immediate direction, it could not have been for one moment contended that he would not be bound to give the fullest particulars as to the circumstances under which this transfer from one account to the other took place. It would be no answer for him to say:

C. A.
1876
ANDERSON
v.
BANK OF
BRITISH
COLUMBIA.
Judgment, C. A.
Baggallay, J.A.

"I did not attend to this matter personally. I sat upstairs, and the business was managed by my clerks here or by my clerks in *Oregon*." He would be bound, for the purpose of making the discovery, to ascertain from his clerks or manager all the particulars of the case. Is there any difference between such a case and this? You have the Defendants, who are a corporation, instead of a Defendant who is an individual. The banking corporation would be bound, in some form or other, either by answer from their manager or by answer put in under their common seal, to give the fullest and most complete information as to the whole matter. It appears to me that such would be the case even if there were no litigation or no threat of litigation, until the bill itself was filed. I can understand no possible ground, consistent with the recognized principles on which discovery is given in suits in equity, upon which the information afforded by this letter can be withheld. It might be very different indeed if the letter had contained certain matters not within the knowledge of the parties writing the letter, or not within their means of information in the ordinary discharge of their duties. It might possibly be that there might be some information contained in the letter which might be the subject of privilege. But that claim is not made here. There is no claim made of special privilege as regards the contents of the letter, but it is simply a claim of privilege on the ground that it was written in reply to a telegram asking for particulars.

Solicitors: *Parker & Clarke; Freshfields & Williams.*

SHARPLEY *v.* LOUTH AND EAST COAST RAILWAY COMPANY.

C. A.
1876
V.-C. M.
Jan. 26, 31;
Feb. 1.
C. A.
March 31.

[1875 S. 187.]

Company—Insufficient Capital—Misrepresentations—Shareholder's Acquiescence.

A shareholder in a company filed a bill to have his contract to take shares declared void on the ground of deception and misrepresentation of the company by reason of their having commenced their railway when only one-fifth of the share capital was subscribed, and having entered into a contract for the construction of a part only of the proposed line, with insufficient capital:—

Held, by *Malins*, V.C., that the grounds alleged by the Plaintiff would have been sufficient to sustain his bill, but that he had disentitled himself to relief by reason of various acts of acquiescence when he knew the financial position of the company, and by reason of delay in filing the bill:—

Held, on appeal (without giving any opinion as to the Plaintiff's original title to relief), that his bill must be dismissed on the ground of his having continued to act as a shareholder for some months after he became aware of the circumstances on which he founded his case.

Statement.

THIS bill, which was filed by *Thomas Sharpley*, a medical practitioner of *Louth*, against the *Louth and East Coast Railway Company*, stated that the Act of Parliament authorizing the construction of the railway received the Royal Assent on the 18th of July, 1872. That the railways thereby authorized were four. The first of which, Railway No. 1, was about twelve miles in length, from *Louth* to *Maplethorpe*. The three other lines, which were branches of No. 1, were to the extent collectively of five miles, making in all seventeen miles; the capital of the company was to be £96,000 in 9600 shares of £10 each. It was provided by the Act that the company should not issue any share created under the authority of the Act, nor should any share vest in the person accepting the same, unless and until a sum not being less than one-fifth of the amount of such share should have been paid in respect thereof; and the company was authorized from time to time to borrow on mortgage any sum not exceeding in the whole £32,000, but no part thereof should be borrowed until the whole capital of £96,000 was subscribed for, issued, and accepted, and one-half thereof was paid up. The powers of the

C. A. 1876 SHARPLEY v. LOUTH AND EAST COAST RAILWAY CO. Statement.

company for the compulsory purchase of lands were not to be exercised after the expiration of three years, and the railways were to be completed within five years from the passing of the Act.

In the year 1873 the Plaintiff received from the company a prospectus containing, among other things, the following statements:—The directors are prepared to receive applications for 9600 shares of £10 each, constituting the share capital of the company. If no allotment be made the deposit of £1 per share will be returned in full. A provisional contract has been entered into with a responsible contractor for the construction of the several railways by the 1st of July, 1875.

The Plaintiff alleged that he was induced by a perusal of the prospectus to believe that it amounted to a representation that the company would not make any allotment of shares or commence business unless sufficient capital was subscribed, that is, unless at least two-thirds of the 9600 shares were issued or allotted, such being the proportion of shares required by the *Stock Exchange* to be issued or allotted before a settling day would be granted. That the objects of the company could not be carried out without the subscription of at least two-thirds of the capital. The Plaintiff applied for thirty shares in the company, and paid £1 per share deposit to the bankers. The shares were afterwards allotted to him, and he then paid a further sum of £60, according to the terms of the prospectus. The period of three years allowed by the Act for the purchase of lands expired on the 18th of July, 1875, but the only land acquired by the company at that date consisted of a few small plots containing but a few acres, and nothing further had been done towards the construction of the railway. The total number of shares applied for in the company did not exceed 1846, representing a subscribed capital of £18,460 only, and of this the total amount subscribed up to March, 1875, was £9619, of which £4664 had been expended in preliminary expenses and bills of costs. The calls in arrear amounted to £1258, and the amount of subscribed capital uncalled was £7394, while the amount of capital for which no subscription had been or could be obtained was £77,540.

In the month of September, 1874, the Plaintiff received a cir-

cular from the company informing him that circumstances had rendered it necessary for them to terminate the negotiations they had entered into for the construction of the railway, and they had since entered into negotiations with a contractor competent to complete the works, and a contract had been prepared which would be submitted to the shareholders for their approval at the next half-yearly meeting of the company. A meeting was accordingly held on the 19th of September, 1874, when it was stated by the chairman that it was clearly understood that if the construction of the railway was not carried out the money entrusted to the directors would be returned to every shareholder. The proposed contract for the construction of the works was then submitted to the meeting, and after much discussion a committee of shareholders was appointed to confer with the directors on the subject and to report at an adjourned meeting which was to be held a fortnight afterwards. The committee so appointed at this meeting prepared a report and sent it to the directors, in which they recommended as follows:—First, they believed that with the amount of capital subscribed it was impracticable to proceed with all the lines of railway which they were empowered to make, and recommended that only No. 1 Railway, from *Louth* to *Maplethorpe*, should be then constructed and the other three postponed. That a contract for No. 1 Railway should be at once entered into based upon the following or somewhat similar terms:—1, that the line should be completed within twelve months from the signing of the contract; 2, that the first one-third part of the contract price and any extras, less 15 per cent. deduction, be taken in shares of the company on certificate of the engineer of the work done, and that no payment be made to the contractor until four miles of the line should be made from the *Louth* end and properly fenced; 3, that the payment of the second one-third part of the contract price and extras, less deduction as aforesaid, be in bonds of the company, exchangeable only for debentures payable at the expiration of three years on debenture stock of the company, and payable for work done on certificate of the engineer; and, 4, that the payment of the third part of the contract price and extras, less deduction as aforesaid, be paid in £5 per cent. bonds of the company, payable at the expiration of three years.

C. A. 1876 — SHARPLEY v. LOUTH AND EAST COAST RAILWAY CO. — Statement.

The committee further stated that they had been informed that the contractor was unwilling to accept the following of their recommendations:—First. The contractor would only undertake to complete the works within twelve months after being put into possession of the land required. Secondly. That he would only agree to a deduction of 10 per cent. from the payments for work done on the engineer's certificate. Thirdly. He would only agree to make and fence two and a half before payment in lieu of four miles. The committee were willing, under the circumstances of the company, to recommend a concession to the contractor's proposals as to the period for completion of the line and as to the length of the line to be constructed before any payment was made, but they considered it essential for the security of the shareholders that the deductions from the payment made to the contractor should be at the rate they had recommended. This they considered of great importance, and that it was absolutely necessary for the protection of the shareholders. They further recommended that the whole of the then subscribed capital of the company should be applied exclusively to the purchase of the land, and that no preferential charges in addition to those named in their recommendations should be created.

The Plaintiff attended the adjourned meeting and protested against a proposed contract being entered into with Mr. *H. Jackson*, a contractor, to make the railways except in accordance with the report and recommendations of the committee. At such meeting the attention of the directors was drawn to the insufficiency of the subscribed capital for the purposes of the undertaking, and particularly with reference to the cost of the land, and nothing was stated by the directors at such meeting of their intention to enforce the calls due by the shareholders. Nothing further took place between the committee of shareholders and the directors until the half-yearly meeting on the 23rd of March, 1875, when a report was submitted by the directors to the meeting, which was to this effect:—On the 3rd of October last a contract was entered into with Messrs. *Henry Jackson & Co.* for the construction of Railways 1, 2, and 4 for a sum of £98,000. The contract also provided for the possession of the land for Railway No. 1 being given to the contractor within nine months from its date. At the

conclusion of the meeting a special meeting would be held for the purpose of authorizing the company to issue debenture stock instead of debentures, and of applying to the Board of Trade for an extension of time to purchase the land required for Railways 2, 3, and 4, and for other purposes. At the last-mentioned meeting the Plaintiff again protested against any further call or payment being made or attempted to be enforced in respect of the shares.

On the 28th of June, 1875, an action was commenced by the company against the Plaintiff in the Queen's Bench to recover the sum of £61 10*s.* 10*d.*, being the amount of the first call of £2 on each of the said thirty shares and interest.

The contractor, Mr. *Henry Jackson*, had not been put into possession of any part of the land required for the railway, and nothing further had been done towards the completion of the railway, and no further capital was likely to be raised by the company, and the railway could not in fact be completed.

The bill prayed that it might be declared that the Plaintiff was induced to apply for thirty shares in the company under circumstances of deception and misrepresentation of the company, and that the contract between the Plaintiff and Defendant company for taking such shares was absolutely void; that the name of the Plaintiff might be removed from the register of shareholders, and that the company might be decreed to repay to the Plaintiff the sum of £90 so paid by the Plaintiff in respect of the said shares; and that the company might be restrained by injunction from further prosecuting the action against the Plaintiff for recovering the said sum of £61 10*s.* 10*d.*, or any sum of money in respect of the said shares.

The Defendant company, by their answer, denied that the prospectus was intended to represent that no allotment of shares would be made unless two-thirds of the 9600 shares were issued or allotted; that the company had nothing to do with the *Stock Exchange*, and were not bound by any rules regulating a settling day. The company was *bonâ fide* formed in the interest of the locality, and it was wholly immaterial to them what the rules of the *Stock Exchange* as to settling days might be. It was immaterial whether the railway could or could not be constructed with-

C. A. 1876

SHARPLEY v. LOUTH AND EAST COAST RAILWAY CO.

Statement.

out the subscription of at least two-thirds of the capital, seeing that the whole of the capital had been subscribed for before the filing of this bill.

The Plaintiff at first applied for twenty shares only in the company on the 1st of December, 1873. A meeting of the shareholders was held on the 28th of March, 1874, to consider the position of the company. At that meeting the shareholders were informed that £14,220 had up to that time been subscribed for in shares; and at such meeting a resolution was passed "That this meeting expresses its entire confidence in the directors, and leaves all matters of detail in their hands." The Plaintiff was not present at that meeting, but the account of it was published in the *Louth* newspaper, and a copy of the newspaper was delivered to the Plaintiff, who must have known what took place at the meeting; and on the 4th of April, 1874, the Plaintiff applied for ten more shares in the company.

Under these circumstances the Plaintiff could not have applied for the thirty shares believing that the directors would not allot shares unless two-thirds of the 9600 shares were applied for. The allotment of shares was made on the 2nd of May, 1874, at which time the directors *bonâ fide* believed that they were in a position to secure the construction of the railway. It was true that the company had only acquired a few acres of land in small strips, but the whole number of acres required to construct the Railway No. 1, which was the longest and most important, was only fifty acres.

The meeting held, as stated in the bill, on the 19th of September, 1874, was attended by the Plaintiff; and the Plaintiff was one of the six persons forming the committee appointed to confer with the directors and report as to the propriety of entering into the contract with Mr. *Jackson*.

At the adjourned meeting, held a fortnight afterwards, the Plaintiff did not protest against the proposed contract being entered into except in accordance with the recommendations of the committee. At that meeting a resolution, "That the contract which had been prepared, subject to as many of the suggestions of the committee as can be complied with, be entered into," was, by way of amendment to a resolution to the effect that the resolutions of

the committee should be carried out, proposed, and was voted for by forty-five of the shareholders then present, and the resolution was voted for by one shareholder only. Neither the Plaintiff nor any member of the committee voted either for the amendment or the original motion. Nothing was stated by the directors at that meeting as to their intention to enforce any calls due by the shareholders, for the reason that at that time no call had been made.

It was in pursuance of the resolution passed at that adjourned meeting that the directors entered into two contracts with *H. Jackson*, one on the 3rd of October, 1874, and another on the 21st of April, 1875, by which *H. Jackson* contracted to fit up and complete the whole of the railways upon the terms and conditions therein mentioned, and by the last contract *Jackson* subscribed for and agreed to take 7754 shares in the company. After that contract was executed the whole of the 9600 shares in the company were in this manner subscribed for and taken up.

The Defendants denied that the contractor had not been put into possession of any part of the land required for the railway; on the contrary, he had been put into possession of land sufficient to make upwards of three miles of railway, and he had commenced the works. The first sod was turned on the 12th of August, 1875, and the directors were taking active steps to obtain possession of all the land which would be required for the whole of the railways and works. The directors believed that the railway could and would be completed, but if it could not, it would be in a great measure because of the action of the Plaintiff in this suit, and of the opposition and prejudice which he had raised and excited against the undertaking.

They further stated that the Plaintiff had never before the filing of the bill applied to the company or to the directors to remove his name from the register of shareholders, or to repay him the said sum of £90. It was not known to the company that they had any power to remove the Plaintiff's name from the register and repay him the £90, even if they were desirous of doing so; but, under the circumstances, they could not, as to their belief or otherwise, say whether the company did or did not refuse to remove the Plaintiff's name from the register, or whether or not to repay him the said sum of £90.

C. A. 1876 — SHARPLEY v. LOUTH AND EAST COAST RAILWAY CO.

There was evidence on behalf of the Plaintiff that the contractor engaged by the directors to perform the works was not a man of sufficient capital to carry out the contract; but, on the other hand, it was shewn that there were men of capital who would support and assist him in the undertaking.

The case came on for hearing before Vice-Chancellor *Malins* on the 26th of January, 1876.

Argument.

Glasse, Q.C., and *Nalder*, for the Plaintiff:—

This case is entirely covered by that of *Cohen* v. *Wilkinson* (1), affirmed on appeal (2). There the company was formed for the purpose of making a railway from *London* to *Portsmouth*, and not having sufficient capital for the purpose they determined upon constructing a portion of the line from *Epsom* to *Leatherhead*, and an injunction was granted to restrain the company from applying the funds in the construction of only part of the line. In that case the Master of the Rolls, Lord *Langdale*, made this observation (3): "I recollect hearing Lord *Eldon*, in the case of *Agar* v. *Regent Canal Company* (4), most distinctly state his opinion, that if it were clear that the company were unable to complete the whole canal contemplated by the Act they could not lawfully begin any part of it."

Here the case is precisely the same; the company have not been able to raise more than a seventh part of the sum prescribed by the Act as the requisite capital for making the line, and without raising that amount they cannot exercise their borrowing powers, consequently they will be totally unable to construct the whole line, but notwithstanding this fact they have entered into a contract for the construction of about four miles of railway. They have not even funds sufficient to purchase the land, and a great portion of the sum already raised has been expended in preliminary expenses. The completion of the scheme is, therefore, utterly hopeless, and the Plaintiff, who applied for shares upon the faith of the whole line being carried out according to the terms of the prospectus, finds his money applied for the payment of expenses. This was the same as the course pursued in the case

(1) 12 Beav. 138.
(2) 1 Mac. & G. 481.
(3) 12 Beav. 128.
(4) 1 Sw. 250.

of *Rooper* v. *East Norfolk Tramway Company* (before Vice-Chancellor *Malins*, July 19, 1875; L.JJ. July 31, 1875).

The prospectus distinctly stated that if no allotment was made the deposit would be returned in full, and the Act provided that the company should not issue any share, nor should any share vest in the person accepting the same, unless and until a sum not being less than one-fifth of the amount of such share should have been paid in respect thereof. The amount so specified has not been paid by any shareholder, therefore the shares cannot be allowed to vest in the applicants for shares, and the Plaintiff is entitled to a return of the money he has paid for a purpose which the company will never be able to effect. The Plaintiff was induced to apply for shares on the misrepresentations contained in the prospectus, and on that ground he is entitled to have his name removed from the list of shareholders. This principle is laid down in the cases of *Henderson* v. *Lacon* (1) and *Western Bank of Scotland* v. *Addie* (2).

It appears from the evidence that Mr. *Jackson*, the contractor, is not a person capable of carrying out the works himself, and this was not known to the Plaintiff at the time he joined with the committee in reporting upon the subject of the contract.

Higgins, Q.C., and *Onslow*, for the Defendant company:—

The case of *Cohen* v. *Wilkinson* (3) has no application to this case, since it was acknowledged there that the company had no intention of constructing any more than one-fourth of the line, which was a very small part of the original length for which the Act was obtained, and it was acknowledged that the funds could never be obtained for the whole line, whereas in this case it never was the intention of the directors to give up the whole line, but only to construct the main line, No. 1, before the three branches. Contracts for the whole of the lines have been entered into, and the directors entertain the full belief that they will be able to make all the railway. The Plaintiff is a medical practitioner in the town, and from the first commencement of the undertaking he took a leading and active part in canvassing for shares, in

(1) Law Rep. 5 Eq. 249. (2) Law Rep. 1 H. L., Sc. 145.
(3) 12 Beav. 138; 1 Mac. & G. 481.

C. A. 1876 SHARPLEY v. LOUTH AND EAST COAST RAILWAY CO. Argument.

attending meetings, and in doing his utmost to forward the scheme. The Plaintiff was aware that the whole of the capital had not been subscribed, and yet after this had been fully stated at the meeting of March, 1874, he applied for ten shares beyond the original twenty shares which he had at first applied for. Again, the Plaintiff himself was a member of the committee appointed to advise with the directors as to the contract, and the committee then advised that No. 1 Railway only should be constructed.

As to misrepresentation, there has been no case amounting to fraudulent misrepresentation, such as appears in *Henderson* v. *Lacon* (1). The true principle is laid down in *Western Bank of Scotland* v. *Addie* (2). A contract to take shares cannot be set aside on the ground of its being founded on a prospectus containing exaggerated views of the advantages of a company, if it does not contain any material misstatement of fact: *Denton* v. *Macniel* (3); nor upon an ambiguous statement, the truth of which might have been ascertained: *Hallows* v. *Fernie* (4); nor by reason of an innocent misrepresentation not affecting the substance of the matter: *Kennedy* v. *Panama, New Zealand, and Australian Royal Mail Company* (5). A misrepresentation which will set aside a contract must be material, and must be made without a belief in the truth of the statement: *Jennings* v. *Broughton* (6).

But whatever difficulties the company may have had, the Plaintiff was well acquainted with all the proceedings. He knew from time to time the amount of capital raised; he, as one of the committee, recommended that the works should be commenced, with the full knowledge of the small amount of capital; and he knew that the contract was to be entered into with Mr. *Jackson*, and advised as to the form of contract. No objection was raised by him to the contractor, and no protest was made against the conduct of the directors. All these are acts of acquiescence which disentitle the Plaintiff to any relief. He is also disentitled on the ground of delay in coming to the Court, since nothing was done by him after the meeting of March, 1875, until the filing of this bill, four months afterwards, on the 24th of July, 1875.

(1) Law Rep. 5 Eq. 249.
(2) Ibid. 1 H. L., Sc. 145.
(3) Ibid. 2 Eq. 352.
(4) Law Rep. 3 Ch. 467.
(5) Ibid. 2 Q. B. 580.
(6) 5 D. M. & G. 126.

If there was any right originally on the part of the Plaintiff to set aside this contract, he has lost it by his subsequent conduct, and has prevented himself from obtaining relief by his delay in coming to the Court. It is the duty of a person who alleges fraud to put forward his complaint at the earliest possible period: *Jennings* v. *Broughton* (1); *Ashley's Case* (2); *Scholey* v. *Central Railway Company of Venezuela* (3). Three months' delay was held sufficient to disentitle the Plaintiff to relief in *Heymann* v *European Central Railway Company* (4); and the time begins to run from the period when the misrepresentation might have been discovered. Any acting under a contract after a man has had notice of the alleged fraudulent circumstances from which he was induced to enter into the contract, amounts to a ratification of it: *Rooper* v. *East Norfolk Tramway Company.*

There has been some misunderstanding as to the clause in the prospectus, that the company should not issue any share, nor should any share vest in the person accepting the same, unless and until a sum not being less than one-fifth of the amount of such share should have been paid in respect thereof." The same clause was discussed in the case of *East Gloucestershire Railway Company* v. *Bartholomew* (5), and it was held that the word "issue" referred to the issuing of certificates of shares, and the word "vest" to the vesting of shares, so as to be property and capable of transfer; but that the section did not make the payment of one-fifth a condition precedent to the liability as a shareholder of the person accepting the share. And under the same clause, in *McEuen* v. *West London Wharves and Warehouses Company* (6), it was decided that, notwithstanding this proviso, a shareholder who had not paid one-fifth of the amount of the shares which had been allotted to him was liable for payment of calls. This was also the decision in *Purdey's Case* (7).

Glasse, in reply:—

The Plaintiff's case is this: that there is a positive undertaking by the company, given in the most formal and complete way, that

(1) 5 D. M. & G. 126.
(2) Law Rep. 9 Eq. 263.
(3) Ibid. 9 Eq. 266, n.
(4) Law Rep. 7 Eq. 154.
(5) Ibid. 3 Ex. 15.
(6) Ibid. 6 Ch. 655.
(7) 16 W. R. 660.

C. A. 1876 — SHARPLEY v. LOUTH AND EAST COAST RAILWAY CO — Argument.

unless there should be a sufficient allotment of shares, the money paid upon them should not be applied for the purpose of making the railway, but should be returned to the shareholders. It turns out that a requisite amount of capital has not been subscribed, and cannot be obtained, and consequently it follows that the project must be abandoned, and the money returned. There was no acquiescence on the part of the Plaintiff to the making of the whole railway, though there might have been acquiescence in the first stages of the proceedings, when all the parties were trying to obtain money to make the line. After all the exertions used it is found to be impossible to raise the capital, and therefore impracticable to make the line; and the Plaintiff, finding this, is only desirous that his money should not be wasted in a useless undertaking. If the contract proposed by the committee had been carried out literally there might have been some ground for contending that the Plaintiff had given a certain amount of acquiescence; but the recommendations of the committee have been departed from in several important particulars, and more particularly in contracting for the formation of the whole line when the company could not even purchase the land necessary for the works, and could not therefore carry out the contract entered into. Moreover, it was not known to the Plaintiff at that time what were the means of the proposed contractor, but subsequent information has shewn that Mr. *Jackson* is not capable of carrying out a contract of this nature, and the whole project must necessarily come to a stand-still, and all the money of the shareholders will be wasted.

Judgment, V.-C. M.

MALINS, V.C.:—

This is a very unfortunate suit, which I think has originated in an over-earnest feeling rather than from any real regard to the interests concerned. The inhabitants of *Louth*, as I gather, very generally concurred in applying to Parliament to make a railway about seventeen miles long, with three branches, the main object being to communicate with different places on the east coast. I have no doubt it was a most desirable thing for the town of *Louth*, and I am satisfied it was an object in which Dr. *Sharpley*, the Plaintiff, who was a medical practitioner in the town, entirely

concurred. I must consider him as approving of the contents of the prospectus, and as concurring in this representation recited in the Act of Parliament: "Whereas the construction of the railways hereinafter mentioned to connect the east coast of *Lincolnshire* with the *Great Northern Railway* near *Louth* would be attended with local and public advantage, and the persons hereinafter named, with others, are willing at their own expense to construct the said railways." The Act then provides "that the amount of capital shall be £96,000, in 9600 shares of £10 each; that the company shall not issue any share created under the authority of the Act, nor shall any share vest in the person accepting the same, unless and until a sum not being less than one-fifth of the amount of such share shall have been paid in respect thereof."

Then there is a borrowing power authorizing the company from time to time to borrow on mortgage any sum not exceeding in the whole £32,000, but no part thereof to be borrowed until the whole capital of £96,000 should be subscribed for, issued, and accepted, and one-half thereof should have been paid up. It is plain, therefore, that Parliament was satisfied that £96,000, plus £32,000, or £128,000, was the proper capital for the construction of this line.

The Act received the Royal Assent on the 18th of July, 1872, but there were considerable delays; the capital was not forthcoming, although the inhabitants of the district were desirous of having the railway made. Very few in point of capital came forward to supply the £128,000 or the £96,000 which was wanted. No allotment was made till the 2nd of May, 1874, and then, instead of subscribing for the whole 9600 shares, it appears that the application which is stated in the bill was for £9619, or about one-tenth of the capital. The prospectus stated that "If no allotment be made the deposit will be returned in full." It also stated that a provisional contract had been entered into with a responsible contractor.

The amount actually subscribed was totally and admittedly inadequate for the construction of the railway.

Now we go on to the 2nd of May, 1874, when the application for shares was so small that it did not provide more than one-fifth of the capital required. And it is plain to my mind that at

C. A. 1876 SHARPLEY v. LOUTH AND EAST COAST RAILWAY CO. Judgment, V.-C. M.

that time the proper course would have been to have announced to the shareholders that the capital was wholly inadequate, that no allotment would be made, and that therefore, in pursuance of the statement in the prospectus, the deposit would be returned, and that there was an end of the matter as the scheme had entirely failed.

Amongst the persons who applied for shares was the Plaintiff, who originally applied for twenty shares on the 1st of September, 1873.

The Plaintiff's course was a very plain one. If he did not concur in going on with this project, he should have at once remonstrated and have required the prospectus to be acted upon. He was fully entitled to say, "You have not got a sufficient amount of capital, your borrowing powers will not arise, you can only get £15,000 or £16,000 out of the amount required. It is utterly absurd to go on with this project, and I require you, in pursuance of the stipulation entered into with me, to return my deposit." That is the course which, in my opinion, common sense, common honesty, and common justice would have entitled him to take; because nothing is more common, not only in the case of this company but in that of other companies which come before me, than for directors to get into trouble when, requiring a large amount of capital, they persist in going on with only a small proportion of the capital which they require. If Dr. *Sharpley* had taken the course which I have suggested, I should have granted him relief, and my own opinion is that the Court of Appeal would have supported me in that decision, and would have restrained the company from going on with their action for calls, and would have required them to give him back his deposit and take his name off the register of the company if he had applied in due time; but as I collect, Dr. *Sharpley* was as much in earnest at this period as any other inhabitant of the town; and he was of opinion that although this project had failed up to that time, nevertheless the thing should not be abandoned, because I find he was then attending meetings. He proposed resolutions and was on the committee. And what does he say? Not that the whole amount of capital should be subscribed before the thing is proceeded with, but that the railway should be gone on with before the

whole of the money was subscribed. The allotment day was the 2nd of May, 1874, but there was a meeting on the 12th of January, 1874, at which Dr. *Sharpley* was in the chair, and at which meeting they knew very well the capital had not been raised and would not be raised. Then he proposes resolutions which are in effect that they should go on with the line. A further meeting took place on the 28th of March, 1874, and again with the full knowledge that the capital had not been subscribed and was not likely to be subscribed. On the 4th of April, 1874, Dr. *Sharpley* applies for ten additional shares; so that before the day of allotment arrived he had not only applied for twenty shares originally, but for ten additional shares. Then on the 2nd of May the whole thirty were allotted to him.

Now the proper course for Dr. *Sharpley*, under these circumstances, to have taken was either to concur with his neighbours who had projected the railway, or if he did not wish to go on with it he should have said, "I do not want to go on with it, give me back my money, I will withdraw." If he had done that, and persisted in it, I have no doubt he would have done great benefit not only to himself but to all his neighbours who are interested in this matter; because, after all, I cannot help thinking that the course adopted by these directors was a very unwise one. They can only make this railway with the assistance of a contractor; they have not the capital, they have not the money to purchase the land. They have not the security of a substantial contractor to make the line, and I believe if they go on they will only get into further trouble. They would have taken a very wise course if they had adopted Dr. *Sharpley's* view, and abandoned the thing altogether; but that does not settle the matter between them and Dr. *Sharpley*. He has encouraged them in their course, which I say is a want of wisdom on his part; and if he has encouraged them, the rules of this Court make it impossible for him to oppose them or to sanction a bill against them, and precludes him from asking for the relief which he seeks by his bill, because he himself has been a participator in the acts of the company.

The question is, whether he has or has not acquiesced in these proceedings? Mr. *Higgins* has cited several cases, and they all proceed on the same principle in effect—that although a man has

C. A. 1876 SHARPLEY v. LOUTH AND EAST COAST RAILWAY CO. Judgment, V.-C. M.

a strict right to restrain the informal proceedings of a company if he does not acquiesce in them, yet if he acquiesces he cannot restrain them. All those cases proceed on the doctrine laid down in *Cohen* v. *Wilkinson* (1), which are, in my opinion, entirely applicable to this case. Mr. *Cohen* was a shareholder in the *Portsmouth Direct Railway Company.* He filed a bill against the company, which was to make a railway from *Portsmouth* to *London,* and made the line from *Epsom* to *Leatherhead* instead of from *Epsom* to *Portsmouth.* There it was decided by Lord *Langdale* in the first instance, and on appeal affirmed by Lord *Cottenham,* that each individual shareholder, inasmuch as he had subscribed his money to make the whole line, was not bound to allow his money to go to make part of the line only, because it did not follow that if the whole line could not be made, a part could be; and I apprehend it is equally clear that any landowners in this case might file a bill to prevent the company from taking his land for the purpose of making a part of the line, because he might say, "I thought this project was a good one. I understood it was intended that the whole of the line was to be made, and that is what I assented to, but I do not assent to part with my land on the railway company making a part of the line only." That being the decision of Lord *Langdale,* affirmed by Lord *Cottenham,* it appears (2) that this doctrine of acquiescence was suggested by Lord *Cottenham* then for the first time, because I find he concluded his judgment in these words:—"His Lordship concluded by observing that the only part of the case about which he entertained any doubt was the allegation at the bar, though nowhere apparent in the bill, that the Plaintiff had been aware of and had acquiesced in the substituted undertaking. The Plaintiff's counsel then stated that this was the first time that such an allegation had been made, and that it was entirely unfounded. The Lord Chancellor, therefore, ordered the appeal motion to be dismissed with costs." I have a distinct recollection of those observations, because I was counsel in that case for the railway company, and I had no doubt that the Plaintiff had acquiesced. But it is clear to my mind, if Lord *Cottenham* had been satisfied that Mr. *Cohen* had agreed to make

(1) 12 Beav. 138; 1 Mac. & G. 481. (2) 1 Mac. & G. 487.

part of the line instead of the whole, he would have dismissed the bill, instead of giving the relief he did. Now what has been the conduct of Dr. *Sharpley?* From the first time of the allotment being made, in May, 1874, he knew of the deficiency of the capital. Has he since that time been a concurring party to making part of the line instead of the whole? Has he been a concurring party in employing the contractor, with a knowledge that the contractor was to supply the means, without being a registered shareholder? Because if he has been a concurring party in that, it is impossible for him to sustain a bill in this Court to restrain these proceedings in which he has participated, and which he has encouraged.

There never has been a more remarkable instance of this than in a case which was before me last year, *Rooper* v. *East Norfolk Tramway Company*, in which the capital was to consist of 10,000 shares of £10 each. It appeared that 204 shares only had been subscribed for, that is, fifty shares by the Plaintiff and 154 shares by other persons, the whole of those shares, including Mr. *Rooper's*, producing £2000 only; the tramroad had not been commenced; it was perfectly clear there was no possibility of making the tramroad, no intention of making it, and it was perfectly plain to me (and, I believe, equally so to the Court of Appeal) that the only purpose to which they were going to apply Mr. *Rooper's* £500, which he was to pay up on the calls for his shares, was to pay their solicitor's bill and their secretary's salary. I thought then, and I think still, that it is a monstrous thing that a man who has subscribed £500 towards a capital of £100,000 to make a great public work, and after £2000 in the whole only has been subscribed, and it is obvious that the plan cannot be carried into execution, should be obliged to pay £500 for the solicitor's bill and the secretary's salary, which £500 he subscribed to make a tramway. I therefore relieved Mr. *Rooper*. It was urged upon me that he had acquiesced, and that he had received a dividend after he knew something of the wretched state of the company, because, in fact, they had paid dividends out of capital. I thought his knowledge was so imperfect at the time he acquiesced, that he was not bound by that acquiescence, and so I gave him relief; and on going to the Court of Appeal Lord Justice *James* and Lord

C. A. 1876 SHARPLEY v. LOUTH AND EAST COAST RAILWAY CO. Judgment, V.-C. M.

Justice *Mellish*, adopting the view that he had accepted a dividend, which they thought was a very strong thing, considered he was bound by his acquiescence, and dismissed the bill with costs, and Mr. *Rooper* was bound to pay the £500, with no possibility of the tramway being made, simply for the purpose of paying the solicitor's costs and secretary's salary. I think the doctrine of acquiescence cannot be carried further than that authority, which is the latest on the subject that has been cited. It is an authority by which I am bound, and which governs this case, if I come to the conclusion that Dr. *Sharpley* has acquiesced in part of the railway being made, and made by the aid of a contractor who has not sufficient capital, and if I am satisfied that he has concurred in the contract entered into with Mr. *Jackson* on the 3rd of October, 1874, to make a part of the line, and has acquiesced in and approved of that contract. The additional contract of the 23rd of April, 1875, is, I think, only a variation of the original contract, and falls within that which is sanctioned by the meeting of the 28th of March, 1874; and although Dr. *Sharpley* did not attend that meeting, I must attribute to him a knowledge of what took place, particularly as he applied for shares after the meeting had taken place. The object of the meeting of the 28th of March, 1874, was obvious to all parties, and the statement in the answer is that it was to consider the then position of the company, and especially with reference to the contractor for constructing the railway and works which was then engaging the attention of the directors, and the amount of the capital of the company which had been subscribed for, and to discuss the prospects of the company. At that meeting the Defendant *James Wilson* informed the shareholders that £14,220 had up to that time been subscribed for in shares, and at such meeting a resolution was duly proposed, seconded, and carried.

Now, here is the intimation that only £14,220 out of £96,000 had up to that time been subscribed for. There is evidence that Dr. *Sharpley* had a report of that meeting, and he must have known of it. Indeed, he does not pretend to say that he did not know it, and he is as much bound by the proceedings of that meeting, in my opinion, as if he had been personally present. Then this resolution was passed, "That this meeting expresses its

entire confidence in the directors, and leaves all matters of detail in their hands." Therefore, here is Dr. *Sharpley*, with a knowledge that only one-seventh of the capital had been subscribed, acquiescing in, concurring in, and recommending the proceeding with the construction of the railway with one-seventh of the capital, and he now comes forward, and says that because the prospectus states, "If no allotment be made, the deposit will be returned in full," therefore he has now a right to have his money returned to him, and his name taken off the register of shareholders. That was a right which was vested in him on the 28th of March, 1874. On that day he might have said, "I am now informed that only one-seventh of the capital is subscribed for. You cannot, therefore, exercise your borrowing powers, and it is nothing less than madness to attempt to construct this railway. It is ridiculous to do so." That would have been a rational course for a man in his position to have taken at that time, and the whole thing would have been put an end to.

However, the question I have to decide is, whether, in this suit of Dr. *Sharpley*, I can grant an injunction against the company to prevent them from doing these very things which he has sanctioned their doing.

Now, with regard to the contract of the 3rd of October, 1874, with Mr. *Jackson*, Dr. *Sharpley* seems to have made no inquiry at that time, and by the evidence, I must consider that he is bound by this contract; and although there is not the same evidence of his personally being bound by the second contract, yet there is a resolution passed by which he is duly informed that the details are left to the directors, in whom he and all other shareholders had entire confidence. Therefore, he has acquiesced in the making of the contract by the agreement of 1875, which is a sanction of what the directors have done on the authority of *Rooper* v. *East Norfolk Tramway Company*, and the other authorities cited by Mr. *Higgins*, namely, the cases of *Denton* v. *Macniel* (1), *Hallows* v. *Fernie* (2), *Kennedy* v. *Panama, New Zealand, and Australian Mail Company* (3), *Ashley's Case* (4), and the case of *Scholey* v. *Central*

(1) Law Rep. 2 Eq. 352.
(2) Ibid. 3 Ch. 467.
(3) Law Rep. 2 Q. B. 580.
(4) Ibid. 9 Eq. 263.

C. A. 1876 SHARPLEY v. LOUTH AND EAST COAST RAILWAY CO. Judgment, V.-C. M.

Railway Company of Venezuela (1). In the last case, Lord *Cairns* lays down the rule that the Plaintiff there had a perfectly clear and a good case if he had come in time, that is, if he had filed his bill as soon as he read the report, but as he delayed doing so for three months, it was too late, and the bill was dismissed.

Then, on the 23rd of March, 1875, I have Dr. *Sharpley* attending a meeting, in which it is plain that the whole circumstances of the company were brought forward. There had been a report of the directors recommending the proceeding with this railway. "It having been moved, That the report of the directors be adopted, and a full discussion having taken place, an amendment was moved by Mr. *J. G. Smith*, and seconded by Mr. *Sharpley*, that the adoption of the report of the directors be adjourned in order that the shareholders might have further details of expenditure." That is the view of Dr. *Sharpley*, that they must have further details of expenditure. What expenditure? An expenditure at a time when only one-fifth or one-sixth of the capital was subscribed, and he was, therefore, sanctioning that expenditure going on. "The amendment having been put to the meeting, it was declared not to have been carried, and the original proposition having been then put, was declared to have been carried by a large majority. The meeting having proceeded to the election of the directors, it was moved that Mr. *Frederick Heritage* be a director of the company, and Mr. *Heritage* was declared to have been duly elected." Now it is perfectly clear that Mr. *Heritage* was the solicitor of Mr. *Jackson*, the contractor; and it is also clear that Mr. *Heritage* had no other claim to be a director of this company than that of being Mr. *Jackson's* solicitor. To my mind it is plain that Mr. *Jackson* had made this stipulation: "I am to find the capital. I am to find the material with which to do the work for £98,000, and in order that my interests may be duly protected, I must have a director on the board." Whom does he select? His solicitor, Mr. *Heritage*. What could Dr. *Sharpley* suppose about this? Why does Dr. *Sharpley* concur in appointing Mr. *Heritage* a director? Only because he knew that Mr. *Jackson* had entered into this contract, and had stipulated that Mr. *Heritage*

(1) Law Rep. 9 Eq. 266, n.

should be a director. Therefore, so late as March, 1875, we have him concurring in the proceedings which he now seeks to stop. I agree very much with what Mr. *Higgins* has said, that such an amount of acquiescence has seldom been brought forward in any case as there is here against Dr. *Sharpley*. That brings us down to the 23rd of March, 1875, and from that time Dr. *Sharpley* appears to have been acquiescent. He does not appear to have taken any further part, but to have remained silent. Did he give any notice to his co-adventurers what his views were? Did he warn them not to go on? The bill has never been amended, and there is no contradiction to this statement in the answer. "The Plaintiff never before the filing of the bill in this suit applied to the Defendant company, or to the directors thereof, to remove, and the Defendant company was not asked to remove, his name from the register of shareholders in the said company, or to repay the Plaintiff the said sum of £90. It is not known to the Defendant company that they have any power to remove the Plaintiff's name from the said register, or to repay him the said sum of £90, even if they were desirous to do so. Under the circumstances aforesaid, we respectively cannot, as to our belief or otherwise, say whether the Defendant company do or do not refuse to remove the Plaintiff's name from the said register, or whether or not to repay him the said sum of £90." But the material statement is, that having acquiesced in the proceedings on the 23rd of March, 1875, with a view of carrying Mr. *Jackson's* contract into execution, he makes no further objection, but remains quiet and allows them to go on; and thereby again acquiesces in their proceedings. But when an action is brought against him for calls, then, in order to restrain that action, he files his bill.

I have not had anything read to shew that he ever protested against the calls. The persons connected with this company are, I believe, a most respectable body of gentlemen; and Mr. *Wilson*, who has been cross-examined, gave his evidence in a manner entirely satisfactory to my mind. A very intelligible statement has been made by him and by others. And although I quite agree with what has been said about this company going on without a sufficient capital, yet I am quite satisfied that everything they have done has been honestly intended to be done by them;

C. A.
1876
SHARPLEY
v.
LOUTH AND EAST COAST RAILWAY CO.
Judgment, V.-C. M.

and that they honestly believe that the railway will be beneficial, and that they hope to carry it out and construct it. But here you have Dr. *Sharpley*, after the meeting of the 23rd of March, identifying himself with these proceedings, and lying by without saying a word and without taking any steps either by himself or by his solicitor, Mr. *Mason*, although Mr. *Mason* is a very zealous solicitor. Why did not Mr. *Mason* write a letter to the company saying, "If any further attempt be made to press my client for calls, he will resist it?" Why did he lie by all this time until an action is brought for calls? It is then for the first time you have a bill filed with this statement in it—that he was induced to take the shares by fraud. All that must be taken into account in considering his conduct. In my opinion he would have been entitled to succeed if it had not been for the acts of acquiescence; but in consequence of the acts of acquiescence I am of opinion he has entirely lost his right to succeed. I therefore think the bill has failed, and has been a very great mistake. I think the acts of Dr. *Sharpley*, and the manner in which he has concurred in these proceedings for so long a time, beginning with the application for shares in December, 1873, and carried down to March, 1875, after he had concurred with his neighbours, who I will assume to be friends of his in the town of *Louth*, have disentitled him to any relief in this suit. Although I was at first impressed with the idea that there were a great many shareholders who concurred with him in the course he has taken, it now turns out, and it has not been contradicted, that there are only shareholders interested in twenty-seven shares, in other words, representing £270, who are now resisting the payment of calls.

I am of opinion, on the whole, that the relief must be refused; that judgment must be entered for the Defendants; that the bill ought not to have been filed, and that it must now be dismissed with costs.

C. A.

The Plaintiff appealed from this decision, and the appeal came on to be heard on the 31st of March, 1876.

Glasse, Q.C., and *Nalder*, for the Appellants, urged the same arguments as below.

Higgins, Q.C., and *Onslow*, for the company, were not called upon.

JAMES, L.J.:—

Looking at the nature of the bill and the facts admitted on both sides, there is no ground for interfering with the decision of the Vice-Chancellor. The case made by the bill is that the Plaintiff was induced to take shares by misrepresentations contained in the prospectus and in a letter of the secretary. That is the Plaintiff's case. The Vice-Chancellor held that, assuming this to be so—assuming, in the Plaintiff's favour, that the misrepresentations were of such a character as the Plaintiff alleged—no relief could be granted, because the Plaintiff, after he knew what the company had done, what it was doing, and what it was able to do, acted as a shareholder, attended meetings of the committee, and for months continued to act as a shareholder with full knowledge of every circumstance entitling him, if he ever was so entitled, to be relieved from his shares. If a man claims to rescind his contract to take shares in a company on the ground that he has been induced to enter into it by misrepresentation, he must rescind it as soon as he learns the facts, or else he forfeits all claim to relief. It is argued that the Plaintiff ought not to remain liable to pay calls because the company are illegally applying them in making part of the line without any intention to make the rest. That is not the case made by the bill, which, to obtain relief on this ground, ought to have been framed in the same kind of way as that in *Cohen* v. *Wilkinson* (1); and it would have been difficult for the Plaintiff, after his being present at and concurring in the proceedings of meetings at which resolutions were passed for making part only of the line, to obtain relief even on a bill so framed.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors for Plaintiff: *Collyer-Bristow, Withers, & Russell.*
Solicitor for Defendants: *R. Dickson.*

(1) 1 Mac. & G. 481.

C. A.
1876
April 25.

GILBERT *v.* SMITH.

[1876 G. 18.]

Practice—Motion for Judgment—Admissions in Pleadings—Rules of Court, 1875, Order XL., r. 11.

5 Ch D. 344
2 Ex D. 304.
11 Ch D. 213.

In a partition action in which the Defendants by their statement of defence admitted the facts stated in the Plaintiffs' statement of claim shewing the title of the Plaintiffs :—

Held (reversing a decision of *Malins*, V.C.), that the Plaintiffs were, under Order XL., rule 11, of the Rules of Court, 1875, entitled to an order on motion directing the usual inquiries as to the persons interested in the property.

Bennett v. *Moore* (1) followed.

Statement.

THE action in this case was commenced in January, 1876, and was for a partition of real estate. The statement of claim stated facts shewing the Plaintiffs to be entitled to one-eighth of the estate, as to which a certificate had been made in a suit of *Pitt* v. *Pitt;* and the statement of defence admitted the several deeds and facts stated in the statement of claim.

The Plaintiffs on the 23rd of March moved before the Vice-Chancellor *Malins* for an inquiry "Who are the persons now interested in or entitled to the freehold hereditaments described in the schedule to the certificate of the 1st of June, 1874, in the Plaintiffs' statement of claim stated, and in what shares and proportions, and whether such persons are all parties to this action, or have been served with notice of this order, and that the further consideration of this action may be adjourned."

The Vice-Chancellor thought that the action ought to have been set down to be heard as a short cause, and offered the Plaintiffs the option of having that done. The Plaintiffs declined to accept this option, stating that the Defendants would oppose; and His Lordship then refused the motion.

The Plaintiffs appealed.

Argument.

Bristowe, Q.C., and *F. A. Lewin*, for the Plaintiffs :—

The Defendants refused to consent to have the action set down to be heard as a short cause; it must, therefore, go into the

(1) 1 Ch. D. 692.

SC at hearing 8 Ch D. 548; 11 Ch D. 75; & affd Ca 651 HL when sale was directed

C. A. 1876 GILBERT v. SMITH. Argument.

general paper, and the hearing might be delayed for many months. Under sect. 9 of the *Partition Act*, 1868 (31 & 32 Vict.c. 40), we have a right to a decree for inquiries; and we submit that this is exactly the case to which Order XL., rule 11, of the Rules of Court, 1875, was intended to apply. Both time and expense will be saved by making the order asked for upon motion. The further hearing can be adjourned, as was done in *Bennett* v. *Moore* (1).

[BAGGALLAY, J.A., referred to *Turquand* v. *Wilson* (2).]

J. Pearson, Q.C., and *Bardswell*, for persons who had obtained leave to attend:—

The order asked for is in fact the decree, and cannot be obtained in this way. If the order is made, it will involve another hearing in Court after the inquiries have been answered. This will cause unnecessary expense. Under the ordinary practice an inquiry would be directed as to the persons interested, and liberty would be given to apply in Chambers for a sale: *Mildmay* v. *Quicke* (3).

Glasse, Q.C., and *Woodroffe*, for the Defendants.

Bristowe, in reply.

Judgment, James, L.J.

JAMES, L.J.:—

I am of opinion that the application of the Plaintiffs was well warranted by Order XL., rule 11. It is quite clear that it was the intention of the new practice to prevent delay and expense as much as possible. It was intended that if there was really anything not the subject of dispute between the parties to an action—if there was anything clearly admitted upon which something ought to be done, the Plaintiff might come to the Court at once to have that thing done, without any further delay or expense.

This is an action for a partition, and it is quite clear that the Plaintiffs are entitled, *ex debito justitiæ*, to an inquiry who the parties interested in the property are. The Plaintiffs deliver their statement of claim, and by the statement of defence their title is

(1) 1 Ch. D. 692. (2) 1 Ch. D. 85.
(3) Law Rep. 20 Eq. 537.

C. A. 1876 GILBERT v. SMITH.

Judgment, James, L.J.

admitted, so that this is exactly the case which would entitle the Plaintiffs to the ordinary decree for an inquiry. Then the Plaintiffs say, "Give us now an order which will be equivalent to the decree." It is answered, "That would be giving you a decree, and you may as well wait and have this done in due form." But if that course were taken, and the other parties insisted on filing affidavits and arguing the case, it would have to go into the general paper, and the hearing might be thrown over for many months. This is, in my opinion, the very thing which the new Rules were intended to prevent. The same question in effect has been considered by other branches of the Court, though in suits of a different kind from the present, and the same view has been taken of the provisions of the Rules. Then, in *Bennett* v. *Moore* (1), Vice-Chancellor *Hall*, following the course adopted by the Master of the Rolls in other cases, upon a motion under Order XL., rule 11, founded on admissions of fact in the answers, made an order amounting to a full decree for execution of the trusts of a settlement, with inquiries as to parties and accounts, and an order that a defaulting trustee should pay money into Court, and adjourned the further hearing of the cause, without requiring any further prior hearing than the motion. The view thus adopted by other branches of the Court seems to me consistent with the spirit of the Rules, and I think the course taken by the Master of the Rolls and the Vice-Chancellor *Hall* should be now followed. There should be an order directing the inquiry asked for, and then, without requiring any further prior hearing, the further hearing of the action should be adjourned, with liberty to any of the parties to apply to have the further hearing taken before the Judge in Chambers. The costs of all parties up to and including the present hearing, including the costs of the motion before the Vice-Chancellor, to be costs in the cause, to be dealt with as the Court shall direct upon the further hearing.

Mellish, L.J.

MELLISH, L.J.:—

I am of the same opinion. I think that rule 11 of Order XL. was framed for the express purpose, that if there was no dispute

(1) 1 Ch. D. 692.

between the parties, and if there was on the pleadings such an admission as to make it plain that the Plaintiff was entitled to a particular order, he should be able to obtain that order at once upon motion. It must, however, be such an admission of facts as would shew that the Plaintiff is clearly entitled to the order asked for, whether it be in the nature of a decree, or a judgment, or anything else. The rule was not meant to apply when there is any serious question of law to be argued. But if there is an admission on the pleadings which clearly entitles the Plaintiff to an order, then the intention was that he should not have to wait, but might at once obtain any order which could have been made on an original hearing of the action.

Judgment, Mellish, L.J.

BAGGALLAY, J.A. :—

Baggallay, J.A.

I am of the same opinion. I think that this rule was intended to apply to a case of this kind. It will effect a saving of both time and expense.

MINUTES :—Order that an inquiry be made who are the persons interested in or entitled to the freehold messuages, lands, and hereditaments described in the schedule to the Chief Clerk's certificate made in the cause of *Pitt* v. *Pitt* and dated 1st day of June, 1874, and mentioned in the 42nd paragraph of the Plaintiff's statement of claim, and in what shares and proportions such persons are so interested or entitled, and whether such persons are parties to this action or have been served with notice of this order. The further consideration of this action is adjourned, and any of the parties are to be at liberty to apply that the hearing on further consideration be in Chambers, but it is ordered that the costs of all parties of this application and of the said order dated 23rd March, 1876, be costs in the cause.

Solicitors for Plaintiffs : *Milward & Whitehead,* agents for *Ryland, Martineau & Carslake, Birmingham.*

Solicitors for Defendants: *Robinson & Preston,* agents for *M. A. Fitter, Birmingham.*

Solicitor for other parties: *John Letts,* Jun., agent for *J. H. Baker, Birmingham.*

C. A. 1876 May 27.

In re BUCKINGHAM (A PERSON OF UNSOUND MIND).

Lunacy—Lands Clauses Consolidation Act, 1845—*Reinvestment.*

The purchase-money of a lunatic's land taken by a public body under the *Lands Clauses Act* was, under the circumstances, ordered to be invested in guaranteed railway stock; but the name of the public body was directed to be omitted from the title of the account, an investment of this nature being treated as equivalent to a reinvestment in land.

Statement.

IN this case the Metropolitan Board of Works had served notice to treat for a house belonging to a lunatic, which was required for the purposes of one of their Acts, with which the *Lands Clauses Consolidation Act*, 1845, was incorporated. The house was let at £110 per annum. The price was ultimately agreed upon at £3050, and the Master in Lunacy made a report approving of a sale at that price. The lunatic, by his committee, then presented a petition in the matter of the lunacy and of the Act under which the property was taken, asking that the report might be confirmed; that the committee might be at liberty to convey to the Board of Works; that the purchase-money might be paid into Court by the Board of Works to the credit of the lunacy, and invested in guaranteed £5 per cent. stock of the *Great Indian Peninsular Railway Company*, and such stock carried to a separate account in the lunacy, to be intituled "The account of *Alfred Buckingham*, a lunatic, and the Metropolitan Board of Works;" that the dividends might be paid to the committee until further order; and for payment of costs according to the Act.

Argument.

W. Barber, for the Petitioner, referred to *In re Milnes* (1).

Ingle Joyce, for the Metropolitan Board of Works, stated that the Board had not yet got a conveyance, and contended that, if the purchase-money were paid in as prayed, and difficulties afterwards arose as to the conveyance, the Board would be under a disadvantage in not being able to vest the property in themselves by deed-poll as if the money had been paid in under the *Lands Clauses Act*, 1845, s. 69.

(1) 1 Ch. D. 28.

THE COURT (*James*, L.J., and *Mellish*, L.J.) considered that under the circumstances of the case an investment in the proposed stock was desirable in order to prevent the diminution of the lunatic's income, and made the order on the undertaking of the committee to execute a conveyance; but directed that the name of the Board should be omitted from the title of the account, treating the proposed investment in railway stock as equivalent to a reinvestment in land, so as to free the Board from all further obligation.

Solicitors: *Jackson, Fox, & Ellen; Solicitor to Metropolitan Board of Works.*

M. R.

1876

March 1, 14, 15, 22.

BRODER *v.* SAILLARD.

1874 B. 355.]

Nuisance—Artificial Work—Injunction—Noise—Damp.

2 C.P.D. 242.

The occupier of a house is liable for allowing the continuance on his premises of any artificial work which causes a nuisance to a neighbour, even though it has been put there before he took possession.

In a suit by the owner and occupier of a house against the occupier of an adjoining house, complaining of noise from the Defendant's stable and of damp from an artificial mound on which it stood:—

Held, that the Plaintiffs were entitled to an injunction to prevent the Defendant from keeping horses in his stable so as to be a nuisance; and that the Defendant was also liable for not preventing the damp from going through the Plaintiffs' wall.

Statement.

THE object of this suit was to restrain an alleged nuisance to the Plaintiffs' house occasioned by damp from the adjoining stables of the Defendant, and from the noise occasioned by the Defendant's horses.

The bill was originally filed in 1874, by *J. L. Broder* and *W. K. Broder*, who were the legal owners, as trustees under a will, and also beneficial owners of the house No. 11, *St. George's Terrace, Regent's Park Road*. The Defendant was the occupier of the adjoining house, called *Hill View*, on the western side thereof. It was erected some years before the suit was instituted, while the Plaintiffs' house was let to one *G. Mills*. The stables belonging to it were built almost against the flank wall of the Plaintiffs' house, upon a mound of earth which was raised to a considerable height against the said wall, which wall was not a party-wall.

In 1874, the former tenancy of No. 11, *St. George's Terrace*, having come to an end, an agreement was entered into between Messrs. *Broder* and *J. M. Milner* for a lease of the house, and while the lease was being prepared *Milner* entered into possession of the house, when, according to the allegation in the bill, he discovered that the Defendant's stables created a nuisance which rendered the house uninhabitable. The Plaintiffs alleged that they were not previously aware of such nuisance.

The 9th paragraph of the bill, as originally framed, was as

See fn. on Reg. Lib. 1876 A 887. 1 Seton 220 No 4.

follows:—"The wall of the said stables is built very near, but not actually touching, the outer wall of the said messuage No. 11, *St. George's Terrace*, and, in consequence, the rain being driven in and lodging between the two walls, and the moisture from the ground not being able to evaporate, the damp soaks into the wall of the said messuage, and the dampness so caused has destroyed the papering in the hall of the said messuage, and is gradually rotting away the wall adjoining the said stables."

The bill was twice amended, and the second time by special leave of the Court, when the following paragraph was substituted:—"The said stables are built as aforesaid on a mound of earth heaped to a great height against the outer wall of the said messuage, 11, *St. George's Terrace*, and the wall of the stables touches, or almost touches, the wall of the house. The drainage and moisture from the stables and rain soaks into the earth on which they are built, and from these causes the damp soaks into the wall of the said messuage," &c. Before the earth was heaped up and the stables built against the said wall, it was perfectly dry and sound.

The bill then alleged as follows:—"A far worse nuisance, however, is caused by the constant noise arising from the stamping and kicking of the horses, the rattling of the ropes and chains and blocks against the ring-bolts and mangers, the rolling and cleaning of carriages, and the other noises inevitable in a stable of considerable size as this is, which cause the greatest discomfort and annoyance to the inmates of the said messuage. The noise and other annoyances are worst at night and in the early morning, and are, in fact, so intolerable that the said *J. M. Milner*, though very desirous of completing his bargain, finds that it is impossible for him to continue to occupy the house. His wife, who is in delicate health, has been compelled to leave, and he has given the Plaintiffs notice that unless the nuisance is abated he will be compelled, at any cost, to refuse to take a lease of the said messuage and premises."

It appeared from the correspondence set out in the bill that the house and stables occupied by the Defendant were built some time before he entered into possession.

M. R.
1876
BRODER
v.
SAILLARD.
Statement.

The bill prayed that the Defendant, his servants and agents, might be restrained from so using the stables adjoining No. 11, *St. George's Terrace*, and from permitting the same to continue in such a state as to occasion any nuisance or annoyance to the occupiers for the time being of the said messuage and premises, or to occasion any damage to the fabric of the said messuage, and for consequential relief.

The defence raised was that the alleged nuisance from the noise of the horses was greatly exaggerated, and that the Defendant could not be answerable for any injury arising from the damp from his stables which were erected before he came into possession.

Affidavits having been filed on behalf of the Plaintiffs and Defendant, the case came on for hearing on the 1st of March, 1876.

Argument.

Roxburgh, Q.C., and *Whitehorne*, for the Plaintiffs.

Southgate, Q.C., *Philbrick*, Q.C., and *Romer*, for the Defendant, took an objection to the frame of the suit that the Messrs. *Broder* were not the proper parties to sue, inasmuch as the alleged injury was of a temporary nature, and did not affect the inheritance, and that the occupier, *J. M. Milner*, was really the person, if any, who was aggrieved.

JESSEL, M.R., gave leave to amend the bill by adding *Milner* as co-Plaintiff. His Lordship also, with the consent of both parties, appointed Mr. *Edward I'Anson*, architect, as special referee, in the following form:—

That it be referred to Mr. *Edward I'Anson*, of *Lawrence Pountney Lane*, in the city of *London*, special referee, to survey and to inspect Plaintiffs' and Defendant's premises respectively, and the premises adjoining thereto respectively, and to report whether or not the Plaintiffs' premises are affected by noise arising or coming from the Defendant's stables as ordinarily used by the Defendant, and if so, then in what manner and to what extent and how the same is caused or arises; and to report whether or not the Plaintiffs' premises are or are likely to be affected by the drainage coming from the Defendant's stables as at present used,

and if so, to what extent, in what manner, and how the same is caused or arises. In making the above report the quality and nature of the construction, the present state, the position of the Plaintiffs' and Defendant's premises, and the nature and composition of their foundation, and the ground on which they stand respectively, are to be considered and reported on. Regard is also to be had to the surrounding levels and adjoining premises, and for the purpose of making his report thereon the said *Edward I'Anson* is to be at liberty to direct all such reasonable works and things on the Plaintiffs' and Defendant's premises to be done as he shall consider necessary; and the said *Edward I'Anson* is to be at liberty to refer to model, plans, and sections, and to bill and answer, of which copies are to be supplied, it being understood that such reference is to bind neither party by way of admission; and for the purpose of the said inquiry the said *Edward I'Anson* is to be attended by one solicitor and by one surveyor, to be appointed by the Plaintiffs and Defendant respectively; and the said *Edward I'Anson* is to attend his Lordship on the sitting of this Court on the 14th of March; and that the cause do stand over until the said 14th of March. (Reg. Lib. 1876 A. 335, 1 Seton 220 No 3)

March 14. Mr. *I'Anson* having made his report, which, so far as material, is referred to in the judgment, the case proceeded, and witnesses were examined on both sides. *Milner* deposed that the rest of himself and his family at night was materially disturbed by the noise of the horses in the adjacent stables.

As to the damp, the Plaintiffs adduced evidence to shew that it was occasioned in some degree by leakage from the soil-pipe of the privy in the Defendant's stables, and partly from the fact of the stables being erected on a mound of made earth, more porous than the surrounding soil, through which the wet percolated to the Plaintiffs' wall.

The Defendant endeavoured to shew that the percolation arose from the porous nature of the bricks of which the Plaintiffs' wall was built. This, however, Mr. *I'Anson* considered not to be the case.

M. R.

1876

BRODER v. SAILLARD.

Argument.

The general effect of the evidence appears from the judgment.

Roxburgh, Q.C., and *Whitehorne*, for the Plaintiffs:—

The Defendant is liable for any nuisance whatever on his premises which seriously inconveniences the occupiers of No. 11, *St. George's Terrace*.

In *Ball* v. *Ray* (1) the Court of Appeal held that the occupier of a house could be restrained from permitting the continuance of a nuisance to the occupier of the neighbouring house occasioned by the noise of horses on the ground floor which he used as a stable, although horses had been kept there previously to his occupation.

In *Brent* v. *Haddon* (2) it was held that the lessee of a mill which was a nuisance to a neighbouring owner was liable in an action.

As to the damp, the evidence shews that it is occasioned partly by the soil-pipe of the privy of the Defendant's stables being broken, and partly by the stables being erected on a mound of made earth at a higher level than the Defendant's house. As regards the former, the Defendant is clearly liable, and so far as the damp arises from the latter cause, he is, we submit, also liable.

In *White* v. *Jameson* (3) your Lordship held that where the occupier of lands granted a license to another to do certain acts on the land, and the licensee in doing them committed a nuisance, the occupier might be made a Defendant in a suit to restrain the nuisance. On the same principle the Defendant is liable in respect of any nuisance which he allows to continue, by whomsoever caused.

Southgate, Q.C., *Philbrick*, Q.C., and *Romer*, for the Defendant:—

The case of *Ball* v. *Ray* does not apply, for there is no evidence here of noise arising from the horses in the Defendant's stables sufficient to justify the interference of the Court.

(1) Law Rep. 8 Ch. 467. (2) Cro. Jac. 553.
(3) Law Rep. 18 Eq. 303.

As to the damp, the fact of some predecessor in title of the Defendant having erected the stables on a mound of made earth on a higher level than the Plaintiffs' house cannot make the Defendant answerable. A man cannot be liable in such a case for acts which he has not done, or which he has not himself permitted others to do, as in *White* v. *Jameson* (1).

Argument.

In *Gaunt* v. *Fynney* (2), where there was only a small amount of annoyance in a case between the owners of adjoining houses, and it was proved to have existed a long time, the Court refused to interfere.

In this case the evidence on both points fails to support the Plaintiffs' contention, and even assuming the nuisance to exist, the Plaintiffs have no remedy against the Defendant.

JESSEL, M.R., after some remarks about conflicting statements in the evidence, continued :—

Judgment.

The position of the Defendant is a remarkable one. The original Plaintiffs were the owners of a house in *St. George's Terrace, Primrose Hill.* The Defendant is the lessee of the house standing immediately above the Plaintiffs' house. He is in a very unfortunate position. He has taken a house, with a stable adjoining, at a high rent, and on the usual terms. He has literally done nothing ; what he may have omitted to do I may come to presently ; but he has done nothing at all except to occupy the house and stables in the usual way, and he finds himself, no doubt to his great annoyance, Defendant to a Chancery suit. On the other hand, the original Plaintiffs seem to be trustees for some persons of this house ; they find their house seriously injured, as they consider, by damp, and not unreasonably, for the injury seems to be considerable. They find their tenant threatening to go away on account of the damp, and on account of the noise which was inflicted upon him by the horses in the Defendant's stables. And, thinking they were not very likely to get another tenant, they instituted this suit to protect the property of which they were trustees.

The complaints are two. The first complaint is that of noise. The Plaintiffs say the noise is so great caused by the horses in

(1) Law Rep. 18 Eq. 303. (2) Law Rep. 8 Ch. 8.

M. R.
1876
BRODER v. SAILLARD.
Judgment.

the Defendant's stables as to prevent the ordinary comfortable use and enjoyment by a tenant of the Plaintiffs' house.

On the case being opened there was an objection made that the house owners could not be properly Plaintiffs in such a case, the noise being a temporary one caused by the horses, which might cease at any moment when the horses were withdrawn. As that has some bearing on the question of costs, I must say what I did on that occasion. Thinking, as I do, that the objection was a valid one, according to the cases of *Mott* v. *Shoolbred* (1) and *Jones* v. *Chappell* (2), I gave the Plaintiffs leave to amend by adding as co-Plaintiff the tenant of the house, which they did. I must consider that as having some bearing on the question of costs, for if that were the only ground of complaint, and they had come here with a wrong Plaintiff, it would be very difficult to make the Defendant pay costs, he being right up to the moment of amendment.

The next ground of complaint is damp. The Plaintiff's bill, as originally framed, alleged as follows:—[His Lordship then read the 9th paragraph of the original bill, and continued:—] That complaint, I believe, is wholly unfounded. It turns out on investigation that the two walls practically touch, that there is a sort of roof covering the interstice between the walls, and that no damp can get through that way. Therefore, so far as the original bill was concerned, the Defendants would have had a defence on the ground that that was not the thing which caused the mischief.

The bill has been amended twice, and the last time by special leave. I think it is the duty of the Court to avail itself of the means placed at its disposal by the new Act of Parliament, and to allow amendments with a liberal hand, so as to really put the facts in issue. But, at the same time, in doing this when those amendments cause a new case to be made, that is, a new case which the Defendant had not his attention drawn to before, I think it ought somewhat to influence the costs.

The bill as amended put it thus:—[His Lordship then read the passage from the amended bill before set forth].

There is a third question, which I must mention with regard to the costs, because, as a rule, I make the costs follow the result, and unless I find there are special and peculiar reasons I shall

(1) Law Rep. 20 Eq. 22. (2) Law Rep. 20 Eq. 539.

always do so. The third ground is this: It is a case of peculiar hardship as regards the Defendant. As I said before, he has done next to nothing. The only act of omission you can charge him with is that, on investigation, it turns out (a thing which of course he did not know) that the soil-pipe in the stables was broken, and that a considerable leakage came from that and leaked through the earth, and increased the dampness of the Plaintiffs' wall, and no doubt increased very much the offensiveness of the dampness. Beyond that he has done nothing directly or indirectly, and I must say it is a case of extreme hardship against him; and I think, in considering costs, the question of hardship is not wholly irrelevant. It is quite irrelevant on a question of law, and it has always been so treated by me; but on the question of costs I do not think it is quite to be overlooked. Therefore, while I give my judgment, as I am bound to do, against him, I do not intend to make it a judgment with costs.

The remaining facts of the case are very few, but I am of opinion that it is shewn that when the original house of the Plaintiffs' was built, what is called the made earth on the plan was not there. I have as regards that the evidence of Mr. *Moore*, the architect who superintended the building. I have also the presumption of circumstances, for I think it is extremely likely that what is called the dry area was built up to the surface, as the architect says it was, and it therefore appears to me to be fairly proved, and also fairly inferred, that made earth was not there. I, therefore, have come to the conclusion, that the Defendant, or rather his predecessors in title, for he certainly did not do it, put the made earth there. That made earth, therefore, is an artificial erection, or artificial work. That is the first conclusion I come to on the question of fact.

The second conclusion I come to on the question of fact is, that if the made earth had not been there, and if the soil-pipe had not been broken, the dampness in question would not have arisen; in other words, I consider the dampness to arise from the contiguity of the made earth, and the nature of it to be altered, and the extent of it to be increased, as Mr. *I'Anson* says, by the defect in the soil-pipe. The result is, that the Defendant must be held liable. As I understand, in the case of the soil-pipe there

M. R.
1876
BRODER
v.
SAILLARD.
Judgment.

is no question about it, but as regards the wet, where does the wet come from? I have no doubt it comes in part, if not entirely, from the water used in washing the horses, and so on, for a great deal of water is used in stables. It was suggested to me it might come from the rain, and therefore that word was put in the bill; but it appears to me the most probable origin of the water is the water used in the stable. But however it comes, if it comes through an artificial work which collects it, in the nature of a large artificial sponge, which absorbs it and keeps it together, until it oozes out by reason of the nature of the sponge, it appears to me I have to say that an artificial work, a work made by man, is a work which if it causes a nuisance is a thing for which the owner of the land is responsible. That is what it comes to.

Now Mr. *Campbell*, who was examined on other points, also said, as regards this made earth, of course it would give away water in a very different manner from virgin clay which had never been disturbed, and he does confirm the view I should have taken independently of his evidence, that the made earth was the chief cause of the mischief, perhaps not the sole cause. That being so, I think, both on principle and authority, the lessee in possession of the house where the artificial work is ought to be responsible for the nuisance occasioned by the existence of that artificial work. Therefore, even independently of the soil-pipe, I should have thought, and still think, the Defendant must be liable to put an end to the nuisance.

[His Lordship then reviewed the evidence as to the drainage from the stable, independently of the soil-pipe, and added:—]

The result is this: To some extent, although probably to a slight extent, the water is flavoured or scented by the stable manure; to what extent is another matter. But no doubt to that extent it is a slight aggravation of the principal cause of injury, and to whatever extent it may be, to that extent of course must the Defendant be responsible. Taking it altogether, I think the Defendant is responsible for such damage, for I am satisfied on the evidence; but I am glad to see that at a comparatively trifling expense—compared to the costs of this suit I am sure very trifling—that injury can be remedied.

I come now to the second branch of the case—the noise. It is

M. R.
1876
BRODER
v.
SAILLARD.
Judgment.

very hard on the Defendant, who is a gentleman with three horses in his stable, and whose horses do not appear to make more than the ordinary noise that horses do, if he is not to be allowed to keep his horses in his stable. On the other hand, it is very hard on the Plaintiffs if they cannot sleep at night, and cannot enjoy their house, because the noise from the stables is so great as seriously to interfere with their rest and comfort. The question is, on which side the law inclines?

If there were no authority on the question I should have felt no difficulty about it, because I take it the law is this, that a man is entitled to the comfortable enjoyment of his dwelling-house. If his neighbour makes such a noise as to interfere with the ordinary use and enjoyment of his dwelling-house, so as to cause serious annoyance and disturbance, the occupier of the dwelling-house is entitled to be protected from it. It is no answer to say that the Defendant is only making a reasonable use of his property, because there are many trades and many occupations which are not only reasonable, but necessary to be followed, and which still cannot be allowed to be followed in the proximity of dwelling-houses, so as to interfere with the comfort of their inhabitants. I suppose a blacksmith's trade is as necessary as most trades in this kingdom; or I might take instances of many noisy and offensive trades, some of which are absolutely necessary, and some of which, no doubt, may not only be reasonably followed, but to which it is absolutely and indispensably necessary for the welfare of mankind that some houses and some pieces of land should be devoted; therefore I think that is not the test. If a stable is built, as this stable is, not as stables usually are, at some distance from dwelling-houses, but next to the wall of the Plaintiffs' dwelling-house, in such a position that the noise would actually prevent the neighbours sleeping, and would frighten them out of their sleep, and would prevent their ordinary and comfortable enjoyment of their dwelling-house, all I can say is, that is not a proper place to keep horses in, although the horses may be ordinarily quiet.

As regards this part of the case, I think the case of *Ball* v. *Ray* (1) is an authority, if authority were wanting. No doubt in

(1) Law Rep. 8 Ch. 467.

M. R. 1876 BRODER v. SAILLARD. Judgment.

Ball v. *Ray* (1) there was a circumstance of aggravation, if I may use the term. The stable in that case had been originally a dwelling-house next door, but it does not appear to me to make any difference in law; a man has a right to turn his dwelling-house into a stable, or his stable into a dwelling-house. That is not the question. The only question which had to be considered there was whether he had a right to make a noise in the stable, so placed as that stable was, which interfered with the use and enjoyment of his neighbour's dwelling-house, and in that respect Lord Justice *Mellish* said (2), "That when in a street like *Green Street* the ground-floor of a neighbouring house is turned into a stable, we are not to consider the noise of horses from that stable like the noise of a pianoforte from a neighbour's house, or the noise of neighbour's children in their nursery, which are noises we must reasonably expect, and must to a considerable extent put up with. A noise of this kind, if it materially disturbs the comfort of the Plaintiff's dwelling-house, and prevents people from sleeping at night, and still more, if it does really and seriously interfere with the Plaintiff's trade as a lodging-house keeper, beyond all question constitutes an actionable nuisance."

The test, therefore, is, whether the stables are unluckily so situated as that the noise from the horses, not being uncommon horses in any way, materially disturbs the comfort of the Plaintiffs' dwelling-house, and prevents the people sleeping at night. In this case we have overwhelming evidence. There are six witnesses called for the Plaintiffs, three of whom have been cross-examined; the other three were not, but there is no reason to impeach their testimony, except upon this ground. It may be said, perhaps, that occasionally some expressions in the affidavits were a little rhetorical, but a person suddenly awoke out of his sleep may not be able accurately to distinguish the kicking of horses, and even the noise of thunder; but there is no reason whatsoever to doubt their testimony, and it is confirmed by a practical experiment performed by Mr. *I'Anson*, who actually only put in the stable a piece of wood with a horse's shoe attached, and when that was struck upon the ground he heard it on the second-floor front; shewing that it is distinctly heard, from the position of the stable, pretty well all

(1) Law Rep. 8 Ch. 467. (2) Law Rep. 8 Ch. 471.

over the Plaintiffs' house. I have no doubt, therefore, upon the facts, that it is a serious annoyance.

It only remains to mention the form of the judgment, and as to that I think the Plaintiffs are entitled to an injunction to prevent the Defendant from keeping or suffering any horses in his stable —describing it—so as to occasion any nuisance to the Plaintiff *Milner* or his family. That was the form which was adopted in *Ball* v. *Ray* (1).

Then I think he is also entitled to a declaration that the Defendant is liable for not preventing the damp and moisture from going through the flank wall of the Plaintiffs' house, by reason of any made earth, or other artificial construction existing on the Defendant's premises, or by reason of any leakage in any soil, pipe, or drain-pipe upon the Defendant's premises. With that declaration, and with an undertaking by the Defendant, which he is willing to give, to execute, or cause to be executed, such works as shall be reasonably required for the purpose of preventing such nuisance or damp coming through the Plaintiffs' wall so as to occasion a nuisance, the nature of such work to be decided upon by the Judge in Chambers if the parties differ, I think it will not be necessary to make any further decree, or grant an injunction, but there will be liberty to apply. For the reasons I have mentioned, I give the judgment without costs. (a)

Solicitors for Plaintiffs: *W. & J. Gibson.*
Solicitors for Defendant: *Phillips & Son.*

(1) Law Rep. 8 Ch. 472.

(a) For mins of judgment see Reg Lib 1876 A 887. (1 Seton 220 6th ed)

M. R.

1876

May 6.

DISNEY *v.* LONGBOURNE.

[1875 D. 29a.]

Practice—Discovery—Interrogatories for Examination of Plaintiff—Rules of Court, 1875, *Order* XXXI., *r.* 1.

14 Ch D. 159

An action was brought against the executors of a deceased trustee seeking to make his estate liable for breaches of trust. The executors were personally ignorant of all the transactions in respect of which the Plaintiff sought relief, and applied for leave to interrogate the Plaintiff before putting in the statement of defence, alleging that the Plaintiff's solicitor (who was partner in a firm of solicitors who had acted for the trustees during the trusteeship of the testator) could furnish information which would enable them to defend the action successfully:—

Held, that leave must be refused, and that the executors must put in such statement of defence as they could, and then interrogate.

Statement.

THIS was an action in which it was sought to charge the estate of a deceased trustee with losses occasioned by breaches of trust of which he was alleged to have been guilty. The executors of the deceased trustee were made Defendants, and a statement of claim had been filed.

An application was now made on behalf of the executors, that they might be at liberty to deliver interrogatories for the examination of the Plaintiff, and that the Plaintiff might be ordered to make an affidavit as to documents.

In support of this application an affidavit was made by one of the executors to the effect that he and his co-executor were entirely ignorant of the transactions in respect of which the Plaintiff sought relief, and had not in their possession or power any documents relating thereto; that they were advised and believed they had a good defence to the action, but that it would be impossible to prepare a defence without further information and the production of documents; and that the deponent believed that the Plaintiff's solicitor (who had been acting partner in the firm of solicitors who acted for the trustees during the trusteeship of their testator) could supply the desired information, and had in his possession many material documents relating to the questions in the action.

Fischer, Q.C., and *Cust*, in support of the application, referred to Rules of Court, 1875, Order XXXI., rule 1.

H. A. Giffard, for the Plaintiff, was not called upon.

M. R.
1876
DISNEY
v.
LONGBOURNE.
Judgment.

JESSEL, M.R. :—

This is a useless application. The rule says that "a Defendant may, at the time of delivering his defence, or at any subsequent time not later than the close of the pleadings, without any order for the purpose, and either party may at any time, by leave of the Court or a Judge, deliver interrogatories in writing for the examination of the opposite party or parties." Now, I am not going to limit the generality of the latter part of the order. As I understand, that part was put in to provide for the case of a party wishing to interrogate after the close of the pleadings; but I do not say it is confined to that case, though I am at a loss to imagine the case in which interrogatories could be allowed under that clause at an earlier period. But what is this case? It is an action against the executors of a trustee for a breach of trust. The executors say they know nothing at all about it. Then their course is plain. Let them put in a statement of defence simply ignoring all the statements in the Plaintiff's statement, and claiming the benefit of every defence open to them; and with that let them deliver interrogatories, which they can then do "without any order for the purpose." But it is suggested that I am to delay the Plaintiff in prosecuting this action, to stop the defence, and delay the Plaintiff from knowing what the defence is until he has answered the interrogatories. I cannot see that I ought to do so. By following the course I have suggested, the Defendants will get every advantage which they can obtain from that which they propose themselves; for if any new defence is disclosed by the answer to the interrogatories, they may get leave to plead it by amending their statement of defence.

Then I was asked to let the application stand over until the statement of defence was put in; but that would be useless, for when the defence is put in the Defendants will be able to deliver interrogatories without any leave from me. The application must be refused with costs.

Solicitors: *Nicholl, Newman, & Co.; W. & A. Ranken Ford.*

V.-C. M.

1876

March 31.

AGAR *v.* GEORGE.

Marriage Settlement—After-acquired Property—Contingent Interest—Inclusion of Existing as well as Future Property.

16 Ch. D. 621, 623
624,
13 Ch. D. 196

By a post-nuptial settlement a husband covenanted to settle any property to which the wife, or he in her right, either then was or at any time during the coverture should become entitled to:—

Held, that a contingent interest in a fund standing in Court to the credit of a cause, which fell into possession after the termination of the coverture, was bound by the covenant.

Statement.

UNDER the decree in this suit a fund had been paid into Court and invested, representing a legacy of £70,000 given to a class of persons by the will of Lord *Callan*, who died on the 9th of October, 1815.

One of the persons interested in the fund was Mrs. *Georgiana Ellis Cole*, who at the time of her marriage with *Henry Cole*, which took place on the 28th of May, 1837, was entitled in expectancy, on the death or second marriage of her mother, to one equal third share of a sum of £13,798 5*s.* 11*d.* consols, which formed part of the £70,000 legacy, and in possession to a sum of £761 3*s.* 2*d.* consols, part of the same fund, and was also entitled contingently on the death without issue of *David Samuel Agar*, who was interested in another portion of the fund, to an aliquot share of such portion, which, when it ultimately fell in, amounted to £1058 15*s.* 2*d.* consols.

A post-nuptial settlement was executed, dated the 21st of August, 1857, by which, after reciting the interest of Mrs. *Cole* in the £13,798 5*s.* 11*d.* consols and the £761 3*s.* 2*d.* consols, and that the husband had agreed to execute an assignment of the first fund and of £561 3*s.* 2*d.* consols, part of the second fund, and to enter into the covenants on his part in manner thereinafter contained, and that it was the intention of himself and his wife to apply to the Court of Chancery for a transfer to him of £200 consols, the remainder of the second fund, the two funds were assigned to three trustees, of whom the present Petitioners were the survivors

upon trusts for investment and payment of the income to the wife during the joint lives of both for her separate use without power of anticipation, and to the survivor during his or her life, and then upon trusts for the children as therein mentioned. And the settlement contained a covenant that if Mrs. *Cole* then was, or if at any time or times during the marriage she or *Henry Cole* in her right should become entitled by descent, transmission, devise, bequest, gift, representation, purchase, or otherwise, to any real or personal property to the value of £250 or upwards for any estate or interest whatever (except jewels and so forth), and also if the application to the Court of Chancery for transfer to *Henry Cole* of the said sum of £200 consols should not be entertained by the Court, then and in every such case the said *Henry Cole* and *Georgiana Ellis Cole* and their respective heirs, executors, and administrators, and all other necessary parties, should, at the cost of the trust estate, as soon as circumstances would admit, and to the satisfaction of the trustees of the settlement, convey, assign, surrender, or assure the said real or personal property, or otherwise cause the same to be well and effectually vested in the said trustees or trustee for the time being of the settlement, and also should consent to or make the necessary application for transferring the sum of £200 consols to the same trustees or trustee upon trust for investment thereof, and for the application of the same property upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations expressed and contained in the settlement concerning the £13,798 5*s.* 11*d.* consols, or as near thereto as the deaths of parties and the other circumstances would admit of.

Mrs. *Cole* died on the 4th of August, 1859, leaving *Henry Cole* surviving.

David Samuel Agar died on the 9th of March, 1874, without ever having been married, and thereupon, under an order in the suit made on the 3rd of July, 1874, a sum of £1058 15*s.* 2*d.* consols was carried over to an account in the suit of "The trustees of the settlement or legal personal representatives of the late *Georgiana Ellis Cole*, deceased."

The trustees of the settlement now petitioned for the payment out of Court to them of the fund.

V.-C. M. 1876 AGAR v. GEORGE. Argument.

J. Pearson, Q.C., and *Stallard*, for the Petitioners:—

The question is whether a contingent interest in property comes within a covenant to settle after-acquired property, which includes all then existing, as well as future property of the wife. This was in effect so decided by *Caldwell* v. *Fellowes* (1), where, under a covenant to settle after-acquired property, a contingent interest in joint tenancy in real estate was held to be severed.

Kekewich, for *Henry Cole*:—

It is, in the first place, clear that this fund is not within the words of futurity in the covenant, and unless it can be treated as property to which the wife was entitled at the time of the settlement, it goes to the husband in his marital right: *Atcherley* v. *Du Moulin* (2); *In re Pedder's Settlement Trusts* (3). The existence of this contingent interest must have been known when the settlement was made, and it must be presumed that the parties intended to exclude it, or it would have been expressly named; and words expressive of a present interest do not include one that is contingent: *Dering* v. *Kynaston* (4).

[MALINS, V.C.:—There were two cases before me in which I held that, in the absence of words to the contrary, it must be assumed that such a covenant related only to property acquired during the coverture.]

Pearson, in reply:—

Those cases were *Dickinson* v. *Dilwyn* (5) and *Carter* v. *Carter* (6), which were affirmed by the Court of Appeal in *In re Edwards* (7), in preference to *Stevens* v. *Van Voorst* (8), which they overruled. But those were cases in which there were no words pointing to the inclusion of property to which the wife was entitled at the date of the settlement. *In re Mackenzie's Settlement* (9) is more like this case than *Dering* v. *Kynaston*, and it appears not to have been cited in the latter case. Lord Justice

(1) Law Rep. 9 Eq. 410.
(2) 2 K. & J. 186.
(3) Law Rep. 10 Eq. 585.
(4) Ibid. 6 Eq. 210.
(5) Law Rep. 8 Eq. 546.
(6) Ibid. 551.
(7) Ibid. 9 Ch. 97
(8) 17 Beav. 305.
(9) Law Rep. 2 Ch. 345.

Turner, in his judgment in that case, treats the principle as directly applicable to the case of contingent interests to which the wife was entitled at the date of the settlement. *Caldwell* v. *Fellowes* (1) really covers the present case, the estate there, though contingent, being affected in devolution by the settlement.

Argument.

[MALINS, V.C.:—*In re Mackenzie's Settlement* (2) seems inconsistent with *Dering* v. *Kynaston* (3).]

Kekewich:—In *In re Mackenzie's Settlement* the interest in question was reversionary, not contingent, and it cannot be cited in opposition to a decision that a contingent interest would pass under the covenant.

MALINS, V.C.:—

Judgment.

I confess I am very glad to find that I am not bound by *Dering* v. *Kynaston*, because it does not commend itself to my mind; but I think I am quite relieved from it, because I consider *In re Mackenzie's Settlement* inconsistent with it. I invited Mr. *Kekewich* to shew me that the two cases could stand together, and he has failed to do so.

Dering v. *Kynaston* was the case of a covenant in a marriage settlement to settle all the property to which the husband and wife, or either of them, were or was at the date of the settlement, or should during the coverture become possessed, and it was held only to include indefeasibly vested estates, and therefore not to include the wife's interest in real estate, which at the date of the settlement stood limited in such a manner that the wife's interest was then contingent only and fell into possession after the termination of the coverture by the death of the husband. Therefore if that had been the only decision it would have covered the present case.

But the Court of Appeal in *In re Mackenzie's Settlement* has decided that a contingent interest in property is within such a covenant. This is, in my opinion, clear from the judgment of the Lord Justice *Turner* in that case. He says (4): "In my

(1) Law Rep. 9 Eq. 410.
(2) Ibid. 2 Ch. 345.
(3) Law Rep. 6 Eq. 210.
(4) Ibid. 2 Ch. 348.

V.-C. M. 1876 AGAR v. GEORGE. Judgment.

opinion this covenant was intended to reach, and does reach, all property in which the Appellant had at the time of the marriage any estate or interest, if the property itself, as distinguished from the estate or interest which the Appellant had in it, was of the value of £400. The covenant was intended, I think, to sweep in every interest which the Appellant had in property of that value. The terms of the covenant seem to me plainly to import this. They are 'if she is, or if she becomes, entitled to property of the value of £400 for any estate or interest whatever.' Could it be said that if she was entitled contingently, or under an executory devise or bequest, to property of larger value the covenant would not reach it? And, surely, if property thus circumstanced would be reached by the covenant, property in which she had a vested reversionary interest would also be reached by it."

The clause in the present case includes all property to which the wife was entitled at the date of the settlement, or to which she might become entitled during the coverture. This was property of more than £250 value, to which she was contingently entitled at the date of the settlement.

I am clearly of opinion that in principle it is included in the settlement, and that the case is covered by the authority of *In re Mackenzie's Settlement* (1). I, therefore, hold that it is bound by the settlement.

Solicitors: *Duncan, Murton, Warren, & Gardner.*

(1) Law Rep. 2 Ch. 345.

FANE *v.* FANE.

V.-C. M.
1876
April 7.

[1875 F. 32.]

Jurisdiction—Heirlooms—Sale apart from Land—Tenant for Life and Remainderman.

The Court has jurisdiction to order a sale of heirlooms apart from the land to which they are attached for the purpose of paying off mortgages, and will do so at the instance of a tenant for life where satisfied that it will be for the benefit of the parties interested that they should be sold, even where there are infant tenants in tail in remainder.

3 Ch D. 636

Statement.

THIS was a petition by the Plaintiff in the suit, who, under limitations contained in the will of Lady *Cecil Jane Georgiana Fane*, was tenant for life of certain estates in *Somersetshire*, with remainder to his first and other sons in tail, with remainders over.

The will, which was dated the 1st of June, 1870, contained a clause in the following words:—"I give all my other pictures and all my engravings, and my china, my diamonds (including a brooch with a very large emerald), and the Irish service of plate with the two gold ice pails, and my books, and all the furniture and effects in my mansion-house at *Brympton* to be settled as heirlooms as long as the rules of law will permit, and to be enjoyed by the person for the time being entitled to my said estates in *Somersetshire*. And I direct my executors to make an inventory of all such pictures, engravings, china, diamonds, plate, books, furniture, and effects. I declare that no part of my estates in the county of *Somerset* shall be sold except for the purpose of paying debts owing by me or legacies given by this my will or any codicil thereto, and no part of the same estates shall be sold even for the purpose of paying such debts or legacies until all my other real estate whatsoever and all the residue of my personal estate not specifically bequeathed has been first sold and the produce applied towards the payment of such debts and legacies."

The testatrix died on the 4th of December, 1874.

The *Brympton* estate consisted of a large mansion-house and about 1235 acres of land, which produced an income of about £3000 a year, but at the death of the testatrix it was subject to

V.-C. M. 1876 FANE v. FANE. Statement.

mortgages amounting to £32,070, the interest of which absorbed half the income from the property. The testatrix's personal estate was only sufficient to keep down certain annuities charged upon it.

The real estates of the testatrix other than the *Brympton* estate were sold, and out of the proceeds of the sale a sufficient fund was provided to reduce the charges on the *Brympton* estate to about £24,000. But the Petitioner found that the net income of the estate, after providing for interest on the charges, did not enable him to keep up the mansion house in a proper state. It was estimated that about £7000 would be produced by the sale of the heirlooms, and the petition asked that they might be sold and the proceeds applied towards the reduction of the mortgages.

Argument.

J. Pearson, Q.C., and *T. H. Robertson*, for the Petitioner.

H. A. Giffard, for trustees and infant tenants in tail in remainder:—

There would, no doubt, be power to sell heirlooms for the payment of debts. The difficulty here is that there is no occasion to resort to them for that purpose. But probably it would be for the benefit of all parties to sell them if it can be done.

Judgment.

MALINS, V.C.:—

A case of *Vansittart* v. *Vansittart*, in which a similar point arose, came before me on the 24th of February last, and I held that I had jurisdiction to order heirlooms to be sold. The order will now be in the same form: "The Court being of opinion that it will be for the benefit of all parties that the heirlooms should be sold, direct them to be sold."

Solicitors: *Frere, Forster, & Frere.*

In re STEAD'S MORTGAGED ESTATES.

V.-C. M.

1876

April 28; *May* 5.

Statutes of Limitation—Equitable Mortgage—Arrears of Interest—3 & 4 Will. 4, c. 27, s. 42; 3 & 4 Will. 4, c. 42, s. 3—Tacking—Money in Court under the Lands Clauses Consolidation Act.

Money paid into Court under the *Lands Clauses Act* for purchase of land which was subject to an equitable mortgage by deposit, with a memorandum undertaking to give a legal mortgage; on petition by the mortgagee for payment out:—

Held, that the analogy of the Statutes of Limitation applied, and that only six years' arrears of interest could be charged.

Edmunds v. *Waugh* (1) explained.

4 Ch D 851
11 Ch D 236

Statement.

THIS was a petition by the assignees of an equitable mortgage for £400 and interest at 5 per cent.

The £400 was originally borrowed by one *Richard Stead*, of *Leeds*, from *John Swaine*, of the same place, and was, with the interest, secured by the promissory note of *Richard Stead* to *John Swaine*, of the same date and for the same amount, and by the deposit with *John Swaine* of the title deeds of the *Harpers' Arms* public-house in *Harper Street, Leeds*, then belonging to *Richard Stead*.

The deposit was accompanied by the following memorandum in writing:—"Memorandum that the several title deeds and writings relating to an estate belonging to me and situate in *Harper Street*, in *Leeds*, in the county of *York*, together with a promissory note for £400, and given to *John Swaine*, are deposited and given to him for securing £400 and interest on demand, being money lent by him to me; and I hereby undertake to give a mortgage upon the said estate if required by the said *John Swaine*, his executors or administrators. Dated this 8th day of January, 1857. *Richard Stead*."

Richard Stead, by his will, dated the 15th of July, 1857, devised all his real and personal estate to three trustees, as to the *Harpers' Arms* public-house, upon trust that his trustees, their heirs and assigns, should stand seised and possessed thereof to the use of such person or persons as his daughter *Mary Elizabeth Milner*, the wife of *James Milner*, of *Leeds*, should, independently of her husband,

(1) Law Rep. 1 Eq. 418.

V.-C. M. 1876 *In re* STEAD'S MORTGAGED ESTATES.

his debts, control, or engagements, by deed or will, direct, limit, or appoint; and in default of such appointment, to the use of Mrs. *Milner* in fee simple.

Statement.

Richard Stead died on the same 15th of July, 1857, and by a deed of the 5th of November, 1864, the mortgage debt and security were assigned to the Petitioners, and the title deeds of the property were handed over to them.

The corporation subsequently required to take the *Harpers' Arms* public-house under the powers of the *Leeds Improvement Act*, 1872, and served upon Mrs. *Milner* the usual notice to treat. On the 7th of February, 1875, they agreed with her to purchase the property for £1050.

No interest had ever been paid upon the mortgage debt, and the full amount of principal and interest remained due since the date of the advance. Mrs. *Milner* was unable to make a title, not having access to the deeds, and the corporation, being desirous of taking possession, paid the purchase-money into Court.

The petition asked for payment to the Petitioners of the principal sum and interest from the date of the advance, as well as the Petitioner's costs.

Argument.

Higgins, Q.C., and *J. T. Humphry*, for the Petitioners:—

The effect of the *Statute of Limitations* is not to extinguish the interest, but merely to bar the right to recover it by suit or other proceeding. And where it can be received without such proceeding the mortgagee has a right to receive and retain it for the full period of twenty years: *Edmunds* v. *Waugh* (1). *Mason* v. *Broadbent* (2) will be relied on as shewing that the mortgagees are only entitled to six years interest. But the distinction between that case and the present is that here no suit is necessary to establish the right to the mortgage money. *Edmunds* v. *Waugh* shews that a petition for payment of the purchase-money out of Court is not such an action or suit.

The Petitioners are, moreover, in equity in the position of having a covenant for the repayment of the debt, which would be a necessary part of a legal mortgage, and by virtue of the covenant are entitled to recover twenty years' arrears of interest: *Lewis* v.

(1) Law Rep. 1 Eq. 418. (2) 33 Beav. 296.

Duncombe (1). This is like the case of a mortgagee who, having acquired possession of the money, may retain any number of years of interest. The money being in Court, all the Petitioners have to do is to shew that principal and interest are due to entitle them to recover all the arrears.

Glasse, Q.C., and *Ingle Joyce*, for Mrs. *Milner* :—

There is no doubt that an executor can retain for a debt barred by the *Statute of Limitations*. That was decided in *Courtenay* v. *Williams* (2), and *Coates* v. *Coates* (3), and if this had been the case of a mortgagee having money of the mortgagor in his hands, very likely he would be entitled to retain sufficient to recoup himself the principal and all the arrears of interest. But that is not the case of the present Petitioners. *Edmunds* v. *Waugh* (4) is said to be an authority for the proposition that a petition such as this is not a proceeding for the recovery of arrears of interest to which the Statutes of Limitation apply. But that was a case of the mortgaged property having been actually sold under the decree in a suit to administer the mortgagee's estate by the exercise of the mortgagee's power of sale, and the petition was by the trustees of that estate for payment of the arrears out of the fund then in Court. There the money was in effect in the possession of the mortgagees. In this case, supposing that the Corporation of *Leeds* had not intervened, the mortgagees could not have realized their security except by a suit. And the fund in Court represents and is to be treated as respects the rights of parties interested as if it had been the estate itself. This petition is, in fact, the statutory substitute for a suit to determine the rights of the parties. The Petitioners here are doing the very thing which Vice-Chancellor *Kindersley* in *Edmunds* v. *Waugh* said would only entitle them to recover six years' arrears. They are coming to a Court of justice to recover the interest. The mortgagor is in possession in contemplation of law, and this is really a proceeding against land.

The distinction between sect. 42 of 3 & 4 Will. 4, c. 27, and sect. 3 of 3 & 4 Will. 4, c. 42, is explained in *Hunter* v. *Knock-*

(1) 29 Beav. 175.
(2) 3 Hare, 539.
(3) 33 Beav. 249.
(4) Law Rep. 1 Eq. 418.

V.-C. M. 1876 *In re* STEAD'S MORTGAGED ESTATES. Argument.

olds (1), the former relating to personal actions only, and the object of the latter being to relieve land from arrears of charges beyond six years.

Dauney, for the Corporation of *Leeds*.

Higgins, in reply:—

There is nothing in the words of the Statutes of Limitation extending their operation beyond actions and suits. The word "suit" had a definite and well-understood meaning when the Statutes of Limitation were passed, and the Petitioners are not, in this case, in the position of having to institute any suit.

Moreover, the memorandum gives the mortgagee a right to have a legal mortgage, and with a legal mortgage there would be a right, having regard to the statute making devised estates liable for debts, to tack the remaining thirteen years' interest to the debt: *Darby* and *Bosanquet* on the Statutes of Limitation (2); *Elvy* v. *Norwood* (3). Even a simple contract debt can be tacked: *Rolfe* v. *Chester* (4). If, therefore, it is clear that, as against the mortgagor and his representatives, the mortgagee is entitled to twenty years' arrears, those arrears may be recovered on this petition. The Petitioners are in the position of mortgagees with a covenant to pay the debt, because that would be a necessary part of a legal mortgage to which they are entitled under the covenant in the memorandum.

[Mr. *Glasse*:—That would not give a right to recover more than six years' arrears: *Shaw* v. *Johnson* (5).]

Shaw v. *Johnson* is inconsistent with the other cases. But it does not apply to the case of these mortgagees, who are in the same position as if they had a covenant in addition to their charge. This would entitle them to twenty years' arrears of income: *Du Vigier* v. *Lee* (6), and a legal mortgage would contain a power of sale under which they might be in possession of the purchase-money: *Edmunds* v. *Waugh* (7) is a clear authority both in sup-

(1) 1 Mac. & G. 640.
(2) Page 150.
(3) 5 De G. & Sm. 240.
(4) 20 Beav. 610.
(5) 1 Dr. & Sm. 412.
(6) 2 Hare, 326.
(7) Law Rep. 1 Eq. 418.

port of the view that the petition is not a suit to which the Statutes of Limitation apply, and also as to the right to tack or retain the whole arrear of interest; and on this point *Elvy* v. *Norwood* (1), *Rolfe* v. *Chester* (2), and *Thomas* v. *Thomas* (3) are conclusive: *Shelford's* Real Property Statutes, by *Carson* (4). In this case, it is the remedy only, and not the right, which is barred. The mortgagees require no remedy or relief, because the money is in Court, and they cannot be forced to give up the deeds without payment.

Argument.

MALINS, V.C.:—

Judgment.

The point raised is one of very considerable importance. I was under the impression last week that the decision of Vice-Chancellor *Kindersley* in *Edmunds* v. *Waugh* (5) established the principle that, where by any means there was a fund in Court out of which the mortgage debt was payable, a petition for payment of the fund out of Court was not a suit or other proceeding for the recovery of the mortgage money or interest, within the meaning of the Statutes of Limitation. And if the circumstances of this case had been like *Edmunds* v. *Waugh*, I should not only have felt myself bound to follow that case, but should have entirely agreed with Vice-Chancellor *Kindersley*.

But that was a case in which the proceeds of the sale of certain mortgaged premises, sold under the power of sale in the mortgage deed, were standing in Court to the credit of a suit for the administration of the estate of the mortgagee. Now it is quite clear that if a mortgagee had the proceeds of the sale of the mortgaged property in his own hands, the legal right of retainer would attach, on the same principle as the right of retainer by an executor for his own debt, and he would be entitled to repay himself the principal, together with arrears of interest for any number of years. And in *Edmunds* v. *Waugh* the position of the parties was as if the mortgagee had the money actually in his hands as mortgagee, and what Vice-Chancellor *Kindersley* really dealt with

(1) 5 De G. & Sm. 240.
(2) 20 Beav. 610.
(3) 22 Beav. 341.
(4) Page 252.
(5) Law Rep. 1 Eq. 418.

V.-C. M. 1876 *In re* STEAD'S MORTGAGED ESTATES. Judgment

was the right of retainer, and he held that the petition, which in effect put the mortgagee in possession of funds which really belonged to him, was not a suit to recover interest within the meaning of the Statutes of Limitation.

Now this present case is a very peculiar one. It is that of an equitable mortgagee with a covenant to have a legal mortgage executed. And if the Petitioners had realized their security, and there had been a deficiency, they would only have stood creditors against the estate of the mortgagor.

Whether *Elvy* v. *Norwood* (1) is quite consistent with later decisions, it is not now necessary to give an opinion. If the mortgagee had taken proceedings in this Court, or had filed a bill of foreclosure, he could only have recovered six years' arrears of interest. The case would then have been simply *Shaw* v. *Johnson* (2). But in this state of things, without any action being taken by the mortgagee, the corporation gave notice to treat for the property, and the price was agreed upon. Then, without further communication with the mortgagor, in order to enable them to take possession, they pay the agreed price into Court.

Therefore I must regard the money in Court as land. It would have followed all the devolutions of land. And the only application is for the money which is the substitute for the land.

Mr. *Higgins* is right in saying that this petition is not either a distress or action, nor strictly a suit. But inasmuch as at the time the Act was passed there was no other proceeding possible than those mentioned, and all the modes of proceeding then possible were enumerated, it must be assumed that if this particular course could then have been taken, it would have been mentioned. But I think that this petition is analogous to a suit for the recovery of land, and therefore that the principal and six years' interest can alone be recovered.

Under all these circumstances, I think the case is not affected by *Edmunds* v. *Waugh* (3), which went upon the principle of the right of retainer, and that this petition must be treated by analogy as a suit to recover principal and interest. The Petitioners, therefore, will receive the principal sum and six years' arrears

(1) 5 De G. & Sm. 240. (2) 1 Dr. & Sm. 412.
(3) Law Rep. 1 Eq. 418.

of interest, and the residue will be carried over to the separate account of Mrs. *Milner*.

The costs of paying in and taking out the fund will be paid by the corporation.

V.-C. M. 1876 *In re* STEAD'S MORTGAGED ESTATES.

Solicitors: *Torr & Co.; Richard Smith; Janson & Co.*

In re LETCHFORD.

V.-C. M. 1876 *May* 26.

Infant entitled to Real Estate—Power of Leasing—Intervening Tenancy by the Curtesy—Estate indefeasibly vested—Act of 11 *Geo.* 4 *&* 1 *Will.* 4, *c.* 65.

The Court has power, under 11 Geo. 4 & 1 Will. 4, c. 65, to sanction a building lease of an infant's freehold estate when he is seised in fee simple in reversion after a life estate by the curtesy vested in his father.

Statement.

THIS was a petition under sect. 17 of the Act of 11 Geo. 4 & 1 Will. 4, c. 65, by an infant, who, as the heir-at-law of his deceased mother, was entitled, subject to an estate for life by the curtesy then vested in his father, to an undivided one-fourteenth part and a third of another undivided one-fourteenth part of certain freehold property in the parish of *Cripplegate*, in the city of *London*, seeking for the sanction of the Court to a building lease of the property for ninety-nine years. The parties entitled to the other shares in the property were *sui juris*, and had agreed to grant the proposed lease.

Argument.

Oswald, for the Petitioner:—

The question whether the Court had jurisdiction under the Act to sanction a lease of an infant's estate, notwithstanding that it was a reversion on an estate by the curtesy, has already been decided in a case of *In re Spencer's Trust*, which came before your Lordship on the 15th of November, 1867.

MALINS, V.C.:—That case not having been reported, it does not appear whether *In re Evans* (1) and *Ex parte Legh* (2), in which

(1) 2 My. & K. 318. (2) 15 Sim. 445.

V.-C. M. 1876 *In re* LETCHFORD.

it was held that the infant must be indefeasibly entitled either in fee or in tail in possession, were cited.

Argument.

Glasse, Q.C., *amicus curiæ*, referred to *In re Clark* (1), in which Lord *Cranworth* had said that the statute ought to be construed liberally, and that the Court might sanction a lease, in some cases, of a defeasible estate.

Judgment.

MALINS, V.C.:—

I am glad to find that there was authority for my decision in *In re Spencer's Trust*, for it appears to me to be a matter of the utmost convenience that a lease should be sanctioned in a case like this; and as I have made the order before, I will make it again. With great deference to Lord *Cottenham*, I think he took a very narrow view of this Act in his decision in *In re Evans* (2). *In re Clark* was subsequent to that decision, and also to *Ex parte Legh* (3), and shews that the strict construction put upon the statute by those decisions will not be maintained. It appears to me as plain as possible that such a case as the present was intended to be within the Act. If not, it would follow that however small a share an infant might have in a property, no lease could be granted of it unless the share was indefeasibly vested in possession, and the object of the Act would often be entirely frustrated. This view seems to be entirely borne out by *In re Clark*.

I think, also, that the infant's interest being so small, and all the other parties concurring, the deposit of a counterpart in Court may be dispensed with.

Solicitors: *Lovell, Son, & Pitfield.*

(1) Law Rep. 1 Ch. 292. (2) 2 My. & K. 318.
(3) 15 Sim. 445.

HARRY *v.* DAVEY.

V.-C. B.

1876

[1875 H. 44*a*.]

March 16, 23; *April* 6.

Practice—Judicature Acts—Specific Performance—Rules of Court, 1875, *Order* XVI., *rr.* 13, 17.

B. agreed to purchase freehold hereditaments of *A.*, who purported to sell under a power of sale contained in a mortgage to *A.*, by *C.*, as trustee and executor of the will of *D.* After acceptance of the title, and preparation of the conveyance, *B.* received formal notice from unpaid residuary legatees of *D.* of a claim by them to the property contracted to be sold.

In an action by *A.* for specific performance of the agreement, a motion by *B.*, that the residuary legatees, who had given notice of their claim, might be added as Defendants to the action, was refused with costs, as no question arose which, for the purpose of being effectually adjudicated upon and settled, required that these residuary legatees should be added as parties.

Statement.

THE writ in this action was served on the 2nd of December, 1875, and was indorsed for specific performance of an agreement for the sale to the Defendants, *Davey*, *Branwell*, and *Bodilly*, of freehold hereditaments at *Penzance*, for the sum of £600, subject to a lease now held by the Defendants, and for damages for breach of the agreement. On the 9th of December, 1875, the Defendants gave notice to the Plaintiff that they did not require a statement of claim to be delivered.

On the 14th of January, 1876, the Defendants delivered a statement of defence, in which they stated that since the agreement for purchase was entered into (November, 1872) they had received through their solicitors formal notice from parties claiming, as residuary legatees under the will of a Mrs. *Wilmot Richards*, to be entitled to the equity of redemption of the property contracted to be sold by the Plaintiff, as mortgagee under his power of sale. The property in question was stated to have been mortgaged in the first instance by one *Tregellas* to *William Richards*, as trustee and executor of the will of Mrs. *Wilmot Richards*, and the equity of redemption was afterwards conveyed to *Richards*. In October, 1859, *William Richards*, as trustee and executor of Mrs. *Richards'* will, in consideration of £500, assigned the mortgage debt, and mortgaged the property to the Plaintiff. Default having been made in payment of the principal and interest due on this mortgage, the

V.-C. B. 1876 HARRY v. DAVEY. Statement.

Plaintiff, in November, 1872, in exercise of his power of sale, put up the property for sale. In November, 1872, the Defendants, who were in possession as lessees, agreed to purchase from the Plaintiffs. According to their statement of defence, they had since received notice of a claim to the property by the residuary legatees under Mrs. *Richards'* will, to whom £375 was due from the estate of *William Richards* (her trustee and executor), who died insolvent in 1873, and had applied the mortgage money, which was alleged to have formed part of her estate, not according to the trusts of her will, but to his own use. It was also stated that the residuary legatees alleged, and had given notice to the Defendants, to the effect that the Plaintiff had express notice of the misapplication of the mortgage money by *William Richards*. Under these circumstances the Defendants stated that they were ready and willing to complete the purchase and perform the agreement, if the Plaintiff could make a good title to the premises, and could procure the claim of the residuary legatees to be withdrawn; but if the Defendants were now to complete the purchase, the residuary legatees, or the persons claiming under them, would at once take proceedings against the Defendants to recover the premises. Accordingly, they submitted that the persons entitled to the residuary estate of Mrs. *Richards* ought to be made parties to the action, so that the questions of title might be determined as between them and the present parties. Part performance of this agreement for purchase was denied.

On the 19th of February, 1876, the Plaintiff delivered his reply, denying any notice that the £500 was not intended to be applied by *William Richards* according to the trusts of Mrs. *Richards'* will, stating that all requisitions as to title had been satisfied or waived, and that since the agreement the Defendants had been in occupation of the property as purchasers under the agreement, without payment of rent, and submitting that under the circumstances the Defendants had accepted the title, and that there had been part performance by them, and that they ought to be compelled specifically to perform the agreement, and pay the Plaintiff the purchase-money with interest, and also damages, caused by the non-performance of the agreement.

The Defendants had taken out a summons (still pending) for

leave to deliver a rejoinder, and on the 16th of March, 1876, they moved, under Order XVI., rules 17, 19, for leave to serve the Plaintiff and *Thomas Davey*, *S. S. Noell*, and *John Harvey*, the residuary legatees, with notice of motion, asking that they might be made parties to the action, for the purpose of determining the question of title.

Statement.

The application was supported by an affidavit to the same effect as their statement of defence, and stating that they had, through their solicitor, applied to the solicitor of the residuary legatees to obtain his consent to accept service of the notice of motion which they were advised to make, and that a reply declining to accept service had been received.

Upon production of a further affidavit, shewing the terms of the notices received by the Defendants' solicitor, from whom and on whose behalf they were given, and the claims made by such notices, the Vice-Chancellor, on the 23rd of March, gave leave to serve notice of motion. The Defendants now moved that the questions of title raised or referred to by the Defendants in their statement of defence delivered in this action, might be determined not only as between the Plaintiff and the Defendants, but as between the residuary legatees under the will of *Wilmot Richards*, in the statement mentioned, or the persons claiming under them.

2. That for the purpose aforesaid the names of the said residuary legatees or the persons claiming under them, or the names of some of such residuary legatees or other persons, may be added as Defendants to this action, and that such pleadings may be ordered to be delivered by the Plaintiff and the persons so added as Defendants, and such proceedings ordered to be taken and generally such directions given as to the Court shall appear proper for having the said questions most conveniently determined.

3. That *Thomas Davey*, *Sam Shepherd Noell*, and *John Harvey*, may be authorized by the Court to defend in this action on behalf of the said residuary legatees.

Argument.

Sir *H. Jackson*, Q.C., and *Grosvenor Woods*, for the Defendants, in support of the motion:—

The case is exactly that which is contemplated by Order XVI.,

V.-C. B. 1876 HARRY v. DAVEY. Argument.

rules 13, 16, 17, under which, upon being satisfied that there is a *bonâ fide* claim raised by third parties, the Court may, upon the application of either the Plaintiff or the Defendant, add the names of such persons as parties in order effectually and completely to adjudicate upon, and settle, all questions involved in the action. An equitable claim to this property has been distinctly asserted, and, therefore, we ask that the adverse claimants may be made parties, that the question may be decided between all parties interested once for all; and upon a liberal and reasonable construction of the Act and Orders the Court has full power to accede to this application. Even under the old practice it seems that the Court "would not unless the point were perfectly clear, or perhaps in any case, compel the purchaser to complete until the adverse claim had been decided on:" *Dart's* Vendors and Purchasers (1). At any rate, the inconvenience of being compelled to decide a question of specific performance in the absence of parties whose claims may hereafter arise is distinctly recognised in *Green* v. *Pulsford* (2).

Under the new procedure (*Judicature Act*, 1873, sect. 24 (3)) power is clearly given to the Court to supply this defect which existed under the old practice; and Order XVI., which gives effect to sect. 24, has been acted upon by giving leave in a specific performance action to serve a trustee who would not under the old practice have been a party, but by his refusal to concur in the conveyance has occasioned the action: *Treleven* v. *Bray* (3).

[*Morshead, amicus curiæ*, stated that in that case the trustee for service upon whom leave was granted by the Appeal Court was a bare trustee.]

[They also referred to *Shephard* v. *Beane* (4).]

Kay, Q.C., and *Millar*, for the Plaintiff:—

As a mere experiment under the *Judicature Act* to introduce a totally new practice which is not warranted by the Acts or Orders, this motion ought to be refused. It is not necessary for the pur-

(1) Page 1105.
(2) 2 Beav. 70, 74.
(3) 1 Ch. D. 176.
(4) 2 Ibid. 223.

pose of determining any question in the action that these residuary legatees should be made parties. If the purchaser has accepted the title the matter is concluded; but if not, then the usual inquiry as to title will be directed, and if the Plaintiff can make a title, is it such a title as can be forced on a purchaser? Under the inquiry as to title, the residuary legatee can be served, and could have been served before the *Judicature Act;* and the Defendants will get all they want. The parties to the contract are alone necessary parties to the action. It has never yet been decided that mere outsiders are necessary parties, and the mere fact that notice has been given of a claim by these persons interested in the purchase-money is no ground for making them parties: *Tasker* v. *Small* (1); and no reason why the contract should not be specifically performed: *Green* v. *Pulsford* (2).

Sir *H. Jackson*, in reply.

Judgment.

BACON, V.C.:—

I have heard the application at much greater length than I should have done otherwise, because it raises a question on the construction of the Judicature Acts and Orders. On those alone does the question depend, and I do not propose to put any liberal but a just construction upon them. His Lordship, after referring to Order XVI., rule 13, said that in the exercise of the discretion given to him by that Order, he did not hesitate to say that these residuary legatees were not parties whose presence was necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the action. The law as to specific performance remains unchanged by anything in the recent statutes. It is clear upon the facts of the case that the Plaintiff can make a good title, and there is no question which cannot be effectually and completely decided without the presence of any of these parties. The title has been approved, and the conveyance prepared and executed on behalf of the Plaintiff, and possession has been taken by the Defendants, and there is nothing in the notice which has been given to prevent a decree being made which will bind both vendor and purchaser.

(1) 3 My. & Cr. 63. (2) 2 Beav. 70.

V.-C. B. 1876 HARRY v. DAVEY.

It is my plain duty to discourage any such experiments as this motion, and I therefore dismiss it with costs.

Grosvenor Woods, upon his summons, then applied for leave to deliver a rejoinder.

BACON, V.C., refused the summons with costs.

Solicitors: *Dangerfield & Blythe; Jones, Blaxland, & Co.*

V.-C. B. 1876 *April* 6.

BOYLE *v.* BETTWS LLANTWIT COLLIERY COMPANY.

[1876 B. 141.]

Company—Voluntary Liquidation—Receiver and Manager—Creditors' Action.

On the application of an unpaid vendor of the property of a company in voluntary liquidation, and unable from insolvency to carry on its works, the vendor was appointed receiver without security or salary.

Perry v. *Oriental Hotels Company* (1) distinguished.

Statement.

MOTION on behalf of the Plaintiffs, who were unpaid vendors, for the appointment of a receiver and manager over the property sold by them to the *Bettws Llantwit Colliery Company*, now under voluntary liquidation.

In June, 1874, the *Bettws Llantwit Colliery*, of which the Plaintiffs were lessees from Lord *Abergavenny*, was conveyed by them to Sir *Wilford Brett* and Mr. *Heseltine* as the trustees and nominees for a company which had been formed to purchase the lease and work the colliery.

It was at the time agreed that part of the purchase-money should remain on mortgage, and that the amount, with interest at 6 per cent., should be secured by a legal mortgage of the colliery and works.

A mortgage was prepared and approved, but had never been actually executed by the trustees on behalf of the company. In the meantime the company had not been successful. The rent fell into arrear, and the freeholder had put in distresses for the

(1) Law Rep. 5 Ch. 420.

rent due at Michaelmas and Christmas, 1875, the amount due having been afterwards paid by the Plaintiffs to prevent a forfeiture of the lease.

At a meeting of the company held on the 15th of March, 1876, a resolution was passed and afterwards registered that, it being proved to the satisfaction of the company that the company cannot by reason of its liabilities continue its business, and that it is desirable to wind up the same, the company be wound up voluntarily, and that Mr. *Layton* be appointed the liquidator to carry on the voluntary liquidation.

On the 27th of March, 1876, the Plaintiffs commenced an action against the company for payment of the balance of their purchase-money (£8000), with interest; specific performance of the agreement to execute in favour of the Plaintiffs a mortgage of the premises; relief on the footing of unpaid mortgagees; the appointment of a receiver and manager; and an injunction to restrain the company from assigning or incumbering the property, and from carrying on or in any manner interfering with the business, property, or affairs of the company.

The Plaintiffs now moved for the appointment of a receiver and manager, and for an injunction until the hearing of the action.

The affidavits in support of the motion stated that the property of the company was fast going to ruin for want of repair; that the works were stopped, and the water rising fast; that the company were entirely without funds, and that it would be impossible for the company, or the voluntary liquidator, to reopen the colliery or carry on the workings; and that there was the risk of ejectment by the freeholder. To prevent this risk the Plaintiffs were willing to provide funds for opening and working the colliery, and they were willing themselves to be appointed receivers and managers of the property.

No affidavits had been filed on behalf of the company, but since notice of motion had been served the company's solicitor wrote offering to consent to an order in the terms of the notice of motion upon condition that the trustees of the company were indemnified by the Plaintiffs.

V.-C. B. 1876 BOYLE v. BETTWS LLANTWIT COLLIERY CO. Argument.

Kay, Q.C. (*Crossley* with him), in support of the motion, contended that, as unpaid vendors, the Plaintiffs were entitled to have the property, which was in imminent peril, protected by the appointment of a receiver and manager. They were willing themselves to be appointed and to act, and it was submitted that they were not bound to give the trustees of the company the indemnity which had been asked on their behalf.

Swanston, Q.C., and *Bradford*, on behalf of the company, opposed the motion:—

The liquidator who has been appointed under the resolution to wind up voluntarily, is the proper person to act as receiver, and unless he is objectionable—which is not suggested—the Court, as a matter of principle, will not appoint any other person in his place: *Perry* v. *Oriental Hotels Company* (1).

If the ordinary practice is departed from, it can only be upon the terms of the Plaintiffs giving an indemnity to the trustees and the company against the rent reserved by the lease under which the Plaintiffs hold.

Judgment.

BACON, V.C.:—

In *Perry* v. *Oriental Hotels Company* the winding-up was under the supervision of the Court, and it was thought unreasonable that there should be two persons to fulfil the office of receiving the rents and profits which the liquidator alone could very well perform; and the same matter came under my consideration very recently in *Campbell* v. *Compagnie Générale de Bellegarde* (2). Here there is no doubt. The Plaintiffs are mortgagees of the colliery, and shew a state of facts which may result in the positive destruction of the property. The liquidator has not the means for carrying on the colliery, and is quite powerless to remedy the evil, and if I do not interfere I must suffer the property of the Plaintiffs to be entirely destroyed.

If the trustees of the company are entitled to any indemnity they must be indemnified by the company, and cannot call on the Plaintiffs to do so. The application of the Plaintiffs, who are really the owners of the colliery, and have a right to be appointed

(1) Law Rep. 5 Ch. 420. (2) 2 Ch. D. 181.

receivers and managers of their property without security and without salary, is perfectly reasonable, and quite consistent with the practice of the Court.

V.-C. B.
1876
BOYLE
v.
BETTWS LLANTWIT COLLIERY CO.

MINUTE OF ORDER:—Appoint Plaintiffs receivers and managers without salary and without security, and restrain Defendants from assigning, disposing of, or charging the property of the company.

Solicitors: *Laundy & Son; Walter Webb.*

ROE *v.* DAVIES.

V.-C. B.
1876
April 12.

[1874 R. 123.]

Practice—Amendment of Bill—Rules of Court, 1875, *Order* XXVII., *r.* 1.

In a suit to set aside a settlement on the ground of fraud and surprise on the Plaintiff, evidence was filed in reply tending to shew that the Plaintiff, at the time of executing the settlement, was of infirm mind.

Upon the hearing of a motion for leave to use this evidence (which had been objected to as not being properly evidence in reply), Plaintiff asked for leave to amend the bill, and go into fresh evidence.

The cause was at issue before the 1st of November, 1875; and the hearing had been fixed, and only accidentally postponed.

Leave was given to the Plaintiff to amend the bill, and go into further evidence.

An order asked for by the Defendant, that the evidence should be taken *vivâ voce*, was refused.

MOTION.

Statement.

In 1858 *Benjamin Howell* died, leaving a widow, *Ann Howell*, and three children, *David*, *William*, and *Susannah*, wife of *David Jones*.

In 1859 the widow, *Ann Howell*, married *Edward Roe*, and by an indenture, dated the 29th of August, 1859, made shortly before the marriage, a piece of leasehold ground in the *New Street*, *Hafod*, *St. John's*, *Swansea*, with five messuages on it, was assigned by *Ann Howell* to a trustee, upon trust, after the marriage, for the separate use of *Ann Howell* for life, and after her decease for such person or persons, and for such intents and purposes as she should from time to time, notwithstanding coverture, by deed or will appoint.

V.-C. B.
1876
ROE
v.
DAVIES.
Statement.

She was further entitled to a policy on her own life in the *Eagle Insurance Company* for securing £200, at an annual premium of £4 4*s.* 4*d.*

After the marriage, which took place on the 1st of September, 1859, *Ann Roe* built another messuage on the above-mentioned piece of ground.

On the 2nd of June, 1864, *Edward Roe* died, leaving no issue of the marriage. After his death *Ann Roe*, the widow, went to live with her son *William*, who was then married to a wife named *Ann*. *William Howell*, until his death, used to collect the rents of the houses and pay the premiums on the policy, and his widow did so after his death.

On the 22nd of November, 1872, *William Howell* died, leaving his widow, *Ann Howell*, and two children, *William Harry Howell* and *Annie Edith Howell*, still infants.

Ann Roe continued to live with her daughter-in-law, *Ann Howell*, until the 31st of May, 1874, when the latter married *David Davies;* whereupon *Ann Roe* went to live with her daughter, *Susannah Jones*, and her husband.

Some difficulties arising between *Ann Roe* and *Ann Davies* about the custody of the lease, the former gave notice, through solicitors, that she intended in future to collect her rents herself, whereupon Mrs. *Davies*' solicitor forwarded a copy of an indenture of settlement, dated the 24th of September, 1873, expressed to be made between *Ann Roe* of the first part, *Ann Howell*, widow (since *Davies*), of the second part, and two trustees of the third part, whereby the piece of leasehold land and the policy were purported to be appointed and assigned by *Ann Roe* to the trustees upon trust to pay the rents to *Ann Roe* for life, and after her decease with the discretion of the trustees, or during her life with her consent in writing, to sell, and hold the proceeds, and also the policy-moneys, upon trust to invest, and stand possessed of the investments in trust for *William Henry Howell* and *Annie Edith Howell*, in equal shares, as therein mentioned.

The bill was filed in 1874, and amended on the 17th of December in the same year. As amended it was a bill by *Ann Roe* against *David Davies* and *Ann* his wife, the trustees of the alleged settlement, the two infants, and the trustee of the marriage settlement,

charging that if the settlement of September, 1873, was duly executed by the Plaintiff, her signature was obtained by surprise, and by the fraud of the Defendant *Ann Davies*, and praying that the alleged settlement might be declared not binding on the Plaintiff, and might be set aside by the decree of the Court; and for other relief.

On the 2nd of December, 1874, *Ann Davies* answered, denying the charges of surprise and fraud.

Affidavits in chief were filed on the 23rd of April, 1875.

Notice of motion for decree was dated and served on the 26th of April, 1875.

Affidavits in defence were filed on the 22nd of June; and on the 6th of August two affidavits were filed in reply. One of these was by *Thomas Dryslwyn Griffiths*, M.D., who stated that having been some years then since Plaintiff's medical attendant, he remembered that in or about 1872 she had a serious illness with some symptoms of softening of the brain, and that she shewed for some weeks distinct signs of mental aberration. He said that since her illness the Plaintiff's mind, more especially her memory, had been very much affected.

The other affidavit was by *William Richards*, husband of a sister of the Plaintiff, and *John Richards* their son, stating that the Plaintiff, at the time of the death of her son *William*, was very ill and strange in her ways, and that it was only within the last twelve months or so that she had recovered herself; and they believed that until quite lately the Plaintiff had not, since the death of *David Howell*, been in a condition of mind enabling her to transact the smallest matters of business.

On the 3rd of March last the Defendants' solicitors wrote to the Plaintiff's solicitors saying they should require the production of all the Plaintiff's witnesses, except one, for cross-examination; and at the same time giving them notice that as to the witnesses, Dr. *Griffiths*, and *William* and *John Richards*, Defendants objected to their affidavits being read, as not being properly evidence in reply. The Plaintiff's solicitors, in answer, insisted upon the right to read and use these affidavits.

Thereupon the Plaintiff's solicitors, on the 3rd of April, 1876, served the Defendants' solicitors with a notice of motion that the

V.-C. B. 1876 ROE v. DAVIES. Statement.

Plaintiff might be at liberty at the hearing of the cause to read and use the above-mentioned two affidavits.

From evidence in support of the motion it appeared that the Plaintiff's advisers were unaware of her alleged mental incapacity until after Defendants' affidavits in answer were filed.

The cause, which had been fixed for hearing on the 24th of March, on which day the witnesses were in attendance, now stood fixed to be heard on the 26th of April next.

Argument.

Kay, Q.C., and *Badcock*, for the motion:—

Upon the evidence adduced, we ask for leave to amend the bill, and to file further affidavits.

The amplest powers are given to the Court by the Rules of Court, 1875, Order XXVII., rule 1; *King* v. *Corke* (1).

Sir *H. Jackson*, Q.C., and *J. T. Humphry*, opposed the application:—

The Plaintiff admits that the case, as it originally stood on the pleadings and evidence, fails. It would be an abuse of the rule to allow a Plaintiff at this stage to abandon her case, and set up a new one. It will be remembered she began by alleging fraud and surprise.

If this application be acceded to, the Court will have renounced the old practice altogether. The application is not what the notice of motion seeks. The Plaintiff might have applied in Chambers for leave to amend; but not when the suit is in its present advanced stage.

The excuse, that the Plaintiff knew nothing about the state of her own mind, must be treated by the Court as insufficient. Can a Plaintiff be permitted to raise a new case solely on the evidence of her medical advisers?

The Court will hold an even hand, and not prejudice the position of the Defendants.

Judgment.

BACON, V.C.:—

Great care, no doubt, is requisite in the construction of every part of this new *Judicature Act;* and it would be difficult to find a

(1) 1 Ch. D. 57.

more extensive alteration in the practice of the Court than is effected by the order which has been read.

The old practice was perfectly well understood. It had been the subject of consideration in *Watts* v *Hyde* (1), in which case Lord Justice *Knight Bruce* thought fit at the hearing of the case to give the Plaintiff, under the circumstances, leave to amend the bill (see *King* v. *Corke* (2)); but Lord *Cottenham* discharged the order (3). The inconvenience and imperfection of the old practice was made so manifest on that occasion, that no one can wonder that a remedy has at length been applied to this defect. And here a very extensive authority has been conferred on the Court, which is enabled to allow either party to alter his statement of claim, "at any stage of the proceedings," without any limitation except the discretion of the Judge.

This matter has been very earnestly discussed before me; and it is admirable to observe the veneration which is expressed for the "old practice" of the Court; and the fear which is entertained on one side lest any profane hand should be laid upon it, whilst, on the other side, counsel exultingly appeal to the extended powers which are now placed at the command of the Judges. But, in truth, it is the discretion of the Court which has to be exercised in the application of this power, as in that of every other power to be found in the Statute and Orders; and it is a discretion which it is most difficult to exercise, because in proportion to the extent of the authority must be the degree of care with which the Court proceeds to exert it.

In this instance, finding, as I do, the old practice of the Court to have been inconvenient and unjust in the highest degree, and that the Legislature has afforded a remedy for these defects, can I hesitate to say—where one of the parties comes to the Court and declares that in order that justice may be done it is necessary that the record shall undergo an alteration—no matter in what stage the cause may be—that this is a case in which I am bound to exercise the discretion which is given to me? I feel that I am bound, when facts such as are here present are brought before me, to see that the record is put into that shape which is necessary in

(1) 2 Coll. 368, 391. (2) 1 Ch. D. 60.
(3) 2 Ph. 406, 409.

V.-C. B. 1876 ROE v. DAVIES. Judgment.

order that the issue between the parties may be fairly tried; and the circumstance that the cause is ready for hearing does not, in my judgment, prevent my doing this. Upon a former occasion (1) when I was called upon to exercise this power, I did so; and in this instance my duty requires me to act in a similar manner, because one of the strongest objections brought forward on behalf of the Defendants is this: "If the Plaintiff is so confident in the goodness of her case in its altered form, let her dismiss her bill and file another;" and this is the very inconvenience which this order is intended to prevent. The Legislature has not thought it reasonable that the Plaintiff should be denied the justice she has invoked.

I have said more on this subject perhaps than I otherwise should on account of the great importance which attends the application of the new rules of practice. No doubt, as has been argued, a rule has been laid down, which is no part, however, of the orders made in pursuance of the statute, that the old practice is to be continued in all causes in which issue has been joined before the 1st of November, 1875. That is a very convenient course to adopt; but, notwithstanding this rule, I have not the slightest doubt that the Plaintiff is entitled, subject to the discretion of the Court, to deal with her own record as she thinks fit.

Sir *H. Jackson*, for the Defendants, objected to the new evidence being taken by affidavit.

Kay observed that in this instance there was a very strong reason why the Plaintiff should not be brought personally into Court.

Sir *H. Jackson* said that under the new practice the Defendant's application was matter of right. If the old practice were to be so far departed from as to allow of amendment of the bill at the hearing, the whole of the new practice must be let in; and if so, the Defendant claimed to have the new evidence taken *vivâ voce*.

BACON, V.C., said that he had heard enough to satisfy him that the old practice was to be departed from only in cases where

(1) *King* v. *Corke*, 1 Ch. D. 57, 60.

it was expedient that this should be done. Here the cause had been at issue long before the 1st of November, 1875. Under the circumstances, the Plaintiff would have leave to amend the bill as she might be advised, and to file further affidavits; with liberty to the Defendants to put in a further answer and evidence; the cause to stand out of the paper, and the costs to be reserved to the hearing.

Solicitors for Plaintiff: *Vizard, Crowder, & Anstie,* agents for *Brown & Collins, Swansea.*

Solicitors for Defendants: *Tamplin, Tayler, & Joseph,* agents for *Strick & Bellingham, Swansea.*

V.-C. H.
1876
March 9.

PADWICK *v.* SCOTT.

[1875 P. 130.]

In re SCOTT'S ESTATE.

SCOTT *v.* PADWICK.

Judicature Act, 1873, *s.* 24, *sub-s.* 3—*Rules of Court*, 1875, *Order* XVII., *rr.* 5, 8; *Order* XVI., *rr.* 17, 18; *Order* XIX., *r.* 3; *Order* XXII., *r.* 9—*Counter-claim.*

4 Ch D. 479, 480
W N (75) 218.
6 Ch D. 750
4 C P D. 33-5
36-8.
5 C P D. 207
8 Q B D. 704
21 Ch D. 802

A Defendant must not bring a third party before the Court as Defendant to a counter-claim against the Plaintiff unless the relief to be obtained against him relates specifically to or is connected with the subject-matter of the action.

The Plaintiff, the trustee of a settlement, by his statement of claim, pleaded that the Defendant, a *cestui que trust* of the settlement, had, by deed, covenanted to indemnify him against an innocent breach of trust in consequence whereof he had been compelled to bring £10,000 into the settlement, and had incurred costs; and he claimed £11,000.

The Defendant delivered a defence and two counter-claims, making the Plaintiff and *A. B.* Defendants to the counter-claims. By the defence he denied that any claim had been made upon or loss sustained by the Plaintiff, and he impeached the validity of the deed of covenant. By his first counter-claim, he stated that the Plaintiff and *A. B.* were the executors of the will of his father, who had joined in the covenant, and had also given to him a covenant of counter-indemnity, and he claimed that the Plaintiff must be held to have admitted assets, and to have retained the amount of his claim out of his testator's estate, or otherwise that such estate might be administered for the purpose. By the second counter-claim, he stated that his father had appointed £10,000 to *A. B.* on a secret trust to satisfy the liability as to the £10,000, and he claimed performance of this trust accordingly:—

Held, upon motion on behalf of the Plaintiff under Order XXII., rule 9 of the Rules of Court, 1875, that both counter-claims must be excluded as not being sufficiently connected with the original subject-matter of the action, and, as calculated unduly to embarrass and delay the Plaintiff.

Statement.

THE Plaintiff, *Henry Padwick*, by his statement of claim in this action, alleged that by deed dated the 10th of December, 1862, and made between the late Sir *Claude E. Scott*, the father, of the first part, the Defendant Sir *Claude E. Scott*, the son, of the second part, and the Plaintiff and *Christopher Robson* (since deceased), of the third part, after reciting an arrangement between the father and the son that three policies of assurance on the life of the

father for £2000, £3000, and £5000 respectively (which had been previously settled upon trusts for the benefit of the son and his wife and children) should be withdrawn from the settlement (of which the Plaintiff and *Christopher Robson* were trustees), and should be assigned to the father absolutely, and that a policy for £10,000 should be effected on the life of the son by the father in the names of the trustees in lieu thereof, to be payable only in the event of the Defendant, the son, dying in the lifetime of the father; and after reciting that this had accordingly been done, the father and the Defendant jointly and severally covenanted with the Plaintiff and *Christopher Robson*, to indemnify them against all actions and demands which might be brought or set up against them on account of the withdrawal from settlement of the three policies, and the assignment of the same to the father.

Sir *Claude E. Scott*, the father, died on the 27th of July, 1874, and the Plaintiff alleged that on account of the withdrawal of the policies from the settlement a demand had been made upon him by the Defendant to make good the loss and diminution in value of the settlement property thereby occasioned, in consequence of which the Plaintiff had been obliged, in order to make good such loss, to bring into the settlement a sum of £10,000, which had been lent by him on mortgage, in substitution for the policies withdrawn.

The Plaintiff also stated that he had incurred divers costs, charges, and expenses, and that the Defendant, although required of him to do so, had not kept him indemnified against the claims and the costs, charges, and expenses he had been put to; and the Plaintiff claimed £11,000.

The Defendant Sir *Claude E. Scott* then delivered a defence and two counter-claims, to which he made the Plaintiff and one *E. H. Scott* Defendants.

In his defence he denied that the Plaintiff had suffered any loss, or that any claim had been made upon him, and he alleged that he had executed the deed of the 10th of December, 1862, when he was little more than twenty-two years of age, and was completely under the influence of his father, who had vested in him large powers of appointment; and the Defendant sub-

V.-C. H. 1876

PADWICK v. SCOTT.

In re SCOTT'S ESTATE.

SCOTT v. PADWICK.

Statement.

mitted that the deed having, with the knowledge of the Plaintiff, been executed by him under duress, was void in equity, and ought to be set aside.

By way of counter-claim the Defendant Sir *Claude E. Scott* stated, first, that as between himself and his father, his father was primarily liable under the covenants in the deed of the 10th of December, 1862, and that he himself was only liable as surety for his father; that the deed contained a second operative part, whereby his father covenanted with him to indemnify him against all actions in respect of the withdrawal of the policies or the covenant of indemnity; that by reason of the relationship of principal and surety, and under the covenant of counter-indemnity, his father and his father's estate were bound to indemnify him; that his father had by his will appointed the Plaintiff and *E. H. Scott*, the second Defendant to the counter-claim, his executors, and made them devisees and legatees in trust; that they had proved his will and possessed themselves of personal estate, and received sale moneys of real estate more than sufficient to satisfy all claims under the deed of the 10th of December, 1862; that they ought to have satisfied or provided for such claims, instead of which they had paid divers legacies without so doing; that by these means the Defendants to the counter-claim must be taken to have admitted assets to satisfy this claim, and that the Plaintiff ought to be considered to have retained out of his testator's estate the amount of it; and that by means of such retainer his claim was wholly extinguished before the commencement of his action. The Defendant then claimed a declaration that the Plaintiff should be considered as having retained out of his testator's estate the amount of his claim, or otherwise that such estate was liable and bound to indemnify him the Defendant Sir *Claude E. Scott* against it, and for a declaration that the Plaintiff and *E. H. Scott* had admitted assets for the purpose, and for an order that they might retain or pay to the Plaintiff the amount of his claim; that if they had not admitted and declined to admit assets it might be declared that the covenant of counter-indemnity ought to be answered and all liability thereunder satisfied out of the estate of the testator in a due course of administration, and that such estate might be administered for the purpose.

Statement.

By way of further counter-claim the Defendant Sir *Claude E. Scott* stated that by a deed-poll dated the 4th of April, 1874, his father had appointed £10,000 to the Defendant *E. H. Scott*, which appointment he alleged was in reality made upon a secret trust to apply the £10,000 appointed in satisfaction of the liabilities of his father and himself under the deed of the 10th of December, 1862, which trust the Defendant *E. H. Scott* had undertaken to perform; and the Defendant Sir *Claude E. Scott* further claimed that the Defendant *E. H. Scott* might be ordered to perform the trust accordingly.

The action was originally brought in the Common Pleas Division, but was, by order dated the 3rd of February, 1876, transferred to the Chancery Division, as the defence raised the question of the validity of the deed of the 10th of December, 1862.

A motion was now made, on behalf of the Plaintiff, under the Rules of Court, 1875, Order XXII., rule 9, that these counter-claims might be excluded.

Argument.

Hastings, Q.C., and *Tremlett*, in support of the motion:—

These counter-claims are set up under Order XIX., rule 3 (1), which was founded on the *Judicature Act* of 1873, s. 24, sub-s. 3 (2).

(1) Order XIX., Rule 3, is as follows: "A defendant in an action may set off, or set up, by way of counter-claim against the claims of the Plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross-action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim. But the Court or a Judge may, on the application of the Plaintiff before trial, if in the opinion of the Court or Judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the Defendant to avail himself thereof."

(2) Sect. 24, sub-sect. 3, is as follows: "The said Courts respectively, and every Judge thereof, shall also have power to grant to any Defendant in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right, or title claimed or asserted by him, all such relief against any Plaintiff or Petitioner as such Defendant shall have properly claimed by his pleading, and as the said Courts respectively, or any Judge thereof, might have granted in any suit instituted for that purpose by the same Defendant against the same Plaintiff or Petitioner; and also all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person,

V.-C. H. 1876

PADWICK v. SCOTT.

In re SCOTT'S ESTATE.

SCOTT v. PADWICK.

Argument.

6 Ch D 751

This section has, however, already received judicial interpretation, which shews that the enactment and the rules founded upon it were not intended to sanction counter-claims such as the present; and it is clear that a Defendant cannot avail himself, by way of counter-claim, of anything on which he could not found an original proceeding. Lord Justice *Mellish*, in *Treleven* v. *Bray* (1), said: "The meaning of sect. 24, sub-sect. 3, was very carefully considered by the Judges. We came to the conclusion that it was not advisable to make any rules which would enable one Defendant to obtain relief against his co-Defendant without an independent action against him. We considered that we had power to do so, but we thought that it would be intolerable that a Plaintiff who might have a good case against the original Defendant, should be compelled to wait for his remedy while the Defendants were fighting *inter se*. The only object of the rules was to bind the third party conclusively by the judgment given as between the Plaintiff and the original Defendant. But if he wants to get an indemnity or other relief against the third party, he must bring an action of his own."

So in this case the Defendant Sir *C. E. Scott*, by his first counter-claim, makes the case that his father was a surety for this debt; but he cannot be entitled to keep the Plaintiff at bay perhaps for years, while he fights out the question with his co-Defendant. The Defendant Sir *C. E. Scott* could not have obtained an injunction to restrain the Plaintiff from suing on his covenant until the estate of his father had been administered; and a creditor cannot be driven to his principal debtor by way of answer to a claim against the surety. The Defendant in effect says: "I am a surety for my father, and his estate is being, or

---

whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any Rule of Court or any Order of the Court, as might properly have been granted against such person if he had been made a Defendant to a cause duly instituted by the same Defendant for the like purpose; and every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim as if he had been duly sued in the ordinary way by such Defendant."

(1) 45 L. J. (Ch.) 113; S. C. 1 Ch. D. 176.

must be, administered; go to it, and see whether you cannot get the amount of your claim from it." This, however, is a simple money claim, while the result of the administration will depend upon many matters which the Court cannot now, or in this suit, deal with: *Wright* v. *Simpson* (1). Had the Defendant, instead of setting up these two counter-claims, filed two bills for the same relief, they would have been dismissed with costs. He has, in fact, mistaken his remedy. His claim is a mere claim for indemnity against a third person; and the difference between a claim for indemnity against a third person and a counter-claim is manifest. The former is co-extensive with the original claim; the latter must operate to diminish or defeat it. Upon this view the Defendant's remedy is to apply under Order XVI., rules 17 and 18, as was done in *Treleven* v. *Bray* (2); instead of which, he has set up a counter-claim under Order XIX., rule 3. And the counter-claim so set up is a cross demand existing in a separate right, which cannot be the subject of set-off in equity: *Freeman* v. *Lomas* (3).

The second counter-claim is open to many of the same objections; and, moreover, the alleged appropriation was made after the time when the liability of the surety accrued, for the deed of covenant was dated in 1862, and the alleged appointment not until 1874, so that the surety could not in any case compel the creditor to have recourse to it.

Dickinson, Q.C., and *Charles Browne*, for the Defendant Sir *C. E. Scott*:—

The Defendant has properly availed himself of the provisions of sect. 24 of the Act of 1873 in the mode pointed out by Order XXII., rule 5, in order to bring before the Court a third person, who is a necessary party to the action; and the observations of Lord Justice *Mellish* in *Treleven* v. *Bray* have no application to a case where the third person is properly made a party. By Order XVII., rule 5, it is expressly provided that claims by or against an executor may be joined with claims by or against him personally. Under sect. 24, sub-sect. 3, three classes of cases arise, and are dealt with by the rules: first, claims by a Defendant against a Plaintiff, dealt with by Order XIX., rule 10; secondly,

(1) 6 Ves. 714.

(2) 45 L. J. (Ch.) 113; S. C. 1 Ch. D. 176.

(3) 9 Hare, 109.

V.-C. H. 1876. PADWICK v. SCOTT. *In re* SCOTT'S ESTATE. SCOTT v. PADWICK.

claims by a Defendant against a third person, dealt with by Order XVI., rules 17, 18, 19, 20, and 21; and, thirdly, claims by a Defendant against the Plaintiff and a third person, dealt with by Order XXII., rule 5. The present is a case within the third class, the scheme of which is to have action and counter-action consolidated together, but presenting the form of two actions. The Defendant has adopted the only course open to him, for he can only prove that there is no cause of action against him by having his father's estate administered, and he cannot do this without having Mr. *E. H. Scott* before the Court.

Kekewich, for Mr. *E. H. Scott*, the second Defendant to the counter-claim.

Judgment.

HALL, V.C.:—

4 C.D. 479 480 8 Q.B.D. 704

I think these counter-claims must be struck out. The first part of sub-sect. 3 of the 24th section of the *Judicature Act* of 1873 enables the Court to grant to any Defendant "all such relief against any Plaintiff as he shall have properly claimed by his pleading, and as any judge might have granted in a suit instituted for that purpose by the same Defendant against the same Plaintiff." That in no way deals with a case like the present, where the subject-matter of the counter-claim is entirely different from that which is the subject-matter of the real claim in the action. A Defendant may, under that part of the section, have a defence, either equitable or legal, against the particular claim, although it be a defence which under the old practice could not have been set up without a cross bill. But it goes no further; it does not enlarge the procedure so as to bring into the particular litigation other matters, which could not, according to the settled practice of the Court, have been litigated therein. This is rendered more clear by the next part of the section, which brings in third parties, and enables the Court to give "all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person."

This sub-section was observed upon by Lord Justice *Mellish* in *Treleven* v. *Bray* (1); and the latter branch of it only enables the Court to grant that relief if the third party "shall have been

(1) 45 L. J. (Ch.) 113; S. C. 1 Ch. D. 176.

duly served with notice in writing of such claim, pursuant to any Rule of Court or any Order of the Court." And it is to be such relief "as might properly have been granted against such person if he had been made a Defendant to a cause duly instituted by the same Defendant for a like purpose." When the Rules of Court came to be settled it was found that a rule under which relief might be granted would so embarrass Plaintiffs as to create injustice; and therefore no such rule was framed.

It was said that the course which has been adopted in the present case derives countenance from the provision of Order XVII., rule 5, by which "claims by or against an executor or administrator as such may be joined with claims by or against him personally, provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which the Plaintiff or Defendant sues or is sued as executor or administrator."

Assuming that the "claim" there spoken of can be considered to include a counter-claim, the meaning of that clause is this: In suing an executor or administrator, it frequently becomes a question whether he should be sued as legal personal representative or personally; and the minds of the framers of that rule were directed to *Ashby* v. *Ashby* (1), and cases of the same class (2), where the executor or administrator has been dealing with the assets, or making contracts in the course of the administration, properly and fairly in his character of executor or administrator, and then it becomes a question whether the contracts, being personally entered into by him, he should be sued in his character of legal personal representative, or in his personal character, being left afterwards to get payment, if he could, out of the assets, in a course of administration. The object of that clause was to get over such difficulties. The rule is one of a series of rules allowing different causes of action to be combined together, and they are guarded by certain restrictions. Thus by the 8th rule of Order XVII.: "Any Defendant alleging that the Plaintiff has united in the same action several causes of action, which cannot be conveniently disposed of in one action, may at any time apply to the Court or a Judge for an order confining the action to such of the causes of action as may be conveniently disposed of in one proceeding." And rule 9 provides: "If on the hearing of such appli-

(1) 7 B. & C. 444. (2) See *Farhall* v. *Farhall*, Law Rep. 7 Ch. 123.

V.-C. H. 1876 PADWICK v. SCOTT. — *In re* SCOTT'S ESTATE. — SCOTT v. PADWICK. — Judgment.

cation as in the last preceding rule mentioned, it shall appear to the Court or a Judge that the causes of action are such as cannot all be conveniently disposed of in one action, the Court or a Judge may order any of such causes of action to be excluded, and may direct the statement of claim, or, if no statement of claim has been delivered, the copy of the writ of summons and the indorsement of claim on the writ of summons, to be amended accordingly, and may make such order as to costs as may be just."

Order XVI., rule 18, is one of the rules providing for cases where a Defendant claims indemnity or other relief against third parties, and it authorizes the party claiming indemnity to issue a notice to a person who is not already a party to the action, which is to state the nature and grounds of the claim, and so forth. If a Defendant proceeds under that rule, he cannot so proceed as to get present relief. That rule merely enables a Defendant to give notice, as Lord Justice *Mellish* has laid down in *Treleven* v. *Bray* (1), so as to bind the third party by the judgment. The counter-claims in this case are not founded on, and do not profess to proceed on, but are quite independent of, that rule; and therefore, as Mr. *Browne* has very fairly said, he cannot claim the benefit of that provision as enabling him to get any relief. That being so, we are left to the other provisions. Order XIX., rule 3, is in these terms: "A Defendant in an action may set off or set up, by way of counter-claim against the claims of the Plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim." That rule is principally addressed to a difficulty which arose under the old law, that you could not set off that which sounded in damages. Admitting that the rule may embrace cases of a different character, the set-off is to "have the same effect as a statement of claim in a cross action, so as to enable the Court to pronounce a final judgment in the same action," and it must be a cross action of a nature connected with the particular original cause of action, so as to be capable of being fairly and reasonably dealt with by way of set-off or counter-claim therein.

21 C.L.D. 863

(1) 45 L. J. (Ch.) 113; S. C. 1 Ch. D. 176.

To deal specifically with these counter-claims. The first of them is in effect this: "You, the Plaintiffs in the original action and the second Defendant to the counter-claim, are the executors of a testator. You have so dealt with his assets, by making certain payments, that if there be an administration of his estate, I shall be able to charge you with an admission in my favour of assets applicable to pay my claim; and as the testator was the principal debtor, you must be considered as having retained moneys sufficient for the purpose, and paid it." It is, however, admitted that that relief cannot be got without a suit; and that the whole matter of the administration of the estate must be gone into, and inquiries made how the assets have been applied, before the conclusion can be arrived at that there has been such a dealing with the assets. But it is said that, under the circumstances, the Court will consider that the executor must have done his duty, that he must be taken to have paid off this particular liability. That appears to me to be an attempt to make a case, and obtain relief against a third party, which cannot be conveniently dealt with in this original action; and I think that the original action ought not to be delayed, nor stayed, in order that such a case may be worked out, the Plaintiff being in the meantime left without remedy in respect of the payments made by him.

Therefore, assuming that the Defendant's case can be considered as within Order XIX., rule 3, I hold that it is within the provision of Order XXII., rule 9, which enables the Court to order that a counter-claim be excluded, and on that ground I order the first counter-claim to be excluded. As regards the second counter-claim, it is in reality a counter-claim against a third party, which has no connection with the testator's estate, further than this, that the testator has made, what is apparently on the face of it, an absolute appointment of a certain sum to that third party; and it is alleged that the appointment was made on a secret trust to pay off this liability. But, treating this counter-claim as if it were a suit raising that question, it is one which involves so many considerations, and is so entirely separate and distinct from the original cause of action sought to be enforced, that I should be doing the Plaintiffs an injustice if I allowed them to be mixed up. On that ground alone I should hold that the second counter-claim

V.-C. H. 1876 PADWICK v. SCOTT. — *In re* SCOTT'S ESTATE. — SCOTT v. PADWICK.

ought not to be allowed to stand; but, independently of that, it also seems to me, having regard to that counter-claim being enforced as against a third party, that I could not, consistently with the construction of the Act of Parliament put upon it by Lord Justice *Mellish*, give such relief as is sought, and therefore that it must also be struck out. The costs of the Plaintiff and the Defendant to the original action must be costs in the cause; the Plaintiff must pay the costs of the Defendant to the counter-claim, and I reserve to him the right to ask for them at the hearing from the Defendant to the action.

Solicitors: *Eardley Holt & Parr; H. & L. Walford; Pawle, Fearon, & Coldham.*

V.-C. H. 1876 *March 27.*

CLARKE *v.* COOKSON.

[1875 C. 241.]

Creditor's Suit prior to 1st November, 1875—Disputed Claim—Issue joined after 1st November, 1875—Right of Trial by Jury—Judicature Act, 1873, ss. 29, 30, 37, 42, 43—Rules of Court, 1875, Order XXVI.; Order XXXVI., rr. 1, 3, 8, 16, 27, 29—Course of Procedure.

3 Ch. D. 128
4 Ch. D. 750,
5 Ch. D. 238-9
— 244.
— 514.
10 Ch. D. 573
11 Ch. D. 658, 661
12 Ch. D. 235.
13 Ch. D. 771.
21 Ch. D. 135

The Plaintiff's claim in a suit for administration instituted prior to the 1st of November, 1875, having been disputed, he, after issue joined subsequently to the 1st of November, 1875, gave notice of trial with a jury in *Middlesex*, but subsequently intimated to the Defendant that the trial would be before the Judge only, and the case was set down for hearing. The Defendant having claimed to have a jury:—

Held, that, under Rules of Court, 1875, Order XXXVI., rule 3, the Defendant had the right which he claimed; and that where the case was of a nature fit to be tried by a jury, the right should not ordinarily be interfered with by the exercise of the discretion given to the Court by rule 26.

Actions in the Chancery Division for trial with a jury are to be set down in *Middlesex*, unless in the statement of claim, or under Order XXXVI., rule 1, the place or county be named.

Under Order XXXVI., rules 27 and 29, a Judge of the Chancery Division can in any case direct issues to be tried by a Judge with a jury at the assizes, or at the sittings in *London* or *Middlesex*.

A Judge of the Chancery Division cannot, having regard to the *Judicature Act*, 1873, ss. 29, 30, 37, and 42, try a case with a jury.

Statement.

THE Plaintiff, a creditor, before the 1st of November, 1875, instituted this suit for the administration of the estate of the

V.-C. H. 1876 CLARKE v. COOKSON.

intestate; his claim being that he was a *bonâ fide* holder for value of a bill of exchange accepted by the intestate. The Defendant, the administrator, denied the making of the bill of exchange, and alleged that, if made, it was given for a gambling debt; and he also denied that the Plaintiff was a *bonâ fide* holder of the bill for value. Issue was joined after the 1st of November, 1875. The Plaintiff gave notice of trial before a Judge and jury in *Middlesex*, but subsequently, probably apprehending that there might be some difficulty in trying the case with a jury in the Chancery Division, his solicitor, by letter, informed the Defendant's solicitors that the Plaintiff proposed to try it without a jury. The Defendant's solicitors, in replying, declined to accede to that proposal, and the case was then set down and came into the paper for hearing. The Defendant having claimed to have the action tried before a Judge and jury, the case was put in the paper to be mentioned as to the mode of trial.

Statement.

Dickinson, Q.C., and *Crossley*, for the Plaintiff.

Argument.

Ingle Joyce, for the Defendant, referred to the old practice of retaining the bill of complaint for a year, with liberty to bring an action at law, in a case where the debt of the creditor who filed the bill was disputed; and also to the case of *Cannot* v. *Morgan* (1).

HALL, V.C.:—

Judgment.

I am of opinion that the Defendant has, under Order XXXVI., rule 3, of the Rules of Court, 1875, a right to have this case tried before a Judge and jury. I consider that either the Plaintiff or the Defendant is entitled to have a jury trial, unless in a case within Order XXXVI., rule 26. This rule enables a Judge, "if it shall appear desirable, to direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which previously to the passing of the Act could, without any consent of parties, be tried without a jury." This rule was framed expressly to meet cases which would under the old system have been tried in the Chancery Division, and which might be considered, by reason of involving a mixture

(1) 1 Ch. D. 3.

V.-C. H. 1876 CLARKE v. COOKSON. Judgment.

of law and fact, or from great complexity, or otherwise, not capable of being conveniently tried before a jury. Where the case is of a nature fit to be tried by a jury, the right of the Plaintiff or Defendant should ordinarily not be interfered with. As regards trial with a jury, where the action is attached to the Chancery Division the course to be adopted is to get it set down in the list of trials for *Middlesex*, unless some other place of trial has been mentioned in the statement of claim under Order XXXVI. rule 1, which enables the Plaintiff to name any county. There is said to have been some difficulty in reference to having this case so entered, but there must be some misapprehension as to that. The proper officer of the Chancery Division will, on application, give a certificate of the case being ready for trial, and a request that it be entered in the list; and if the officer whose duty it is to make out such list will not enter it, application should be made to a Judge of the Division whose officer has to make out the list, to order him so to do. A Judge of the Chancery Division can in any case, under Order XXXVI., rule 27, direct issues to be tried by a Judge with a jury; and rule 29 of the same Order empowers the Judge to order a trial at the assizes or at the sittings to be held in *London* or *Middlesex*, and such cases must of course be set down with the other cases to be so tried. The question whether a Judge of the Chancery Division can try a case with a jury has been much considered by the Master of the Rolls, Vice-Chancellor *Malins*, and Vice-Chancellor *Bacon*, and by me, and we all consider that he cannot do so, having regard to sects. 29, 30, 37, and 42 of the *Judicature Act*, 1873. This conclusion has been come to after considering the provisions of Lord *Cairns'* *Act* and Lord Justice *Rolt's Act*, and also referring to Order XXXVI., rules 1, 8, 16; Orders XXVI., XXXIX.; and sect. 43 of the Act of 1873.

After some discussion it was arranged that issues should be settled, and tried at the sittings in *Middlesex*.

Solicitors: *James Mason; Bell, Brodrick, & Gray.*

In re LISTER. *Ex parte* SIMMONS.

C. J. B. 1876 April 10.

Trustee—Failure to perform Duties—Report of Comptroller—Disallowance of Remuneration voted by Creditors—Rehearing—Appeal—Time—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 14, 55, 71; *Bankruptcy Rules*, 1870, *rr.* 121, 143, 243, 246, 247, 251.

When the Comptroller in Bankruptcy has reported to the Court that a trustee has failed to perform the duties imposed on him by the Act and the Rules, the Court has power to disallow the trustee the remuneration which has been voted to him by the creditors.

When an order has been made, the Court ought not to allow a rehearing of the matter merely for the purpose of enabling an appeal to be brought which would otherwise have been too late.

Statement.

THIS was an appeal from a decision of the Judge of the *Carmarthen* County Court.

John George Lister, a shipbuilder at *Milford*, was adjudicated a bankrupt on the 21st of January, 1874, and on the 11th of February *John Simmons* was appointed trustee of his property. On the 21st of October, 1875, a special meeting of the creditors was held, at which it was resolved that *Simmons* should be removed from his office of trustee; that the amount of remuneration awarded by the committee of inspection to *Simmons* should be paid to him for his services; that *Robert Buck* should be appointed trustee in his place; and that *Simmons* should be directed to hand over to *Buck* all books, papers, and moneys in his hands, or under his control, belonging to the estate. The committee of inspection had, on the 10th of March, 1874, fixed the amount of remuneration to be paid to *Simmons* at £30, in addition to expenses out of pocket. On the 22nd of December, 1875, the Comptroller in Bankruptcy made a report to the Court that in his judgment *Simmons*, as trustee, had not faithfully performed his duties, and duly observed the requirements imposed upon him by the statute and Rules, "in having, contrary to the statute, failed to transmit to me the certified copy of his estate book, due on the 24th of October, 1874, as required by sect. 55 of the *Bankruptcy Act*, 1869, and rule 247 of the Bankruptcy Rules, 1870, and has not, upon being thereunto required by me, given satisfactory explanation of

C. J. B.
1876
In re LISTER.
Ex parte SIMMONS.

Statement.

his conduct in that behalf to me, as Comptroller in Bankruptcy duly appointed." On the 23rd of December, the Registrar of the Court gave notice to *Simmons* that he was required to attend the Court on the 11th of January, 1876, to explain why he had failed to comply with the requisition of the Comptroller. On the 11th of January the matter came on to be heard by the Judge. *Simmons* did not appear in person, but was represented by a solicitor. The Judge ordered that *Simmons* should, within fourteen days from service of the order upon him, transmit to the Comptroller the certified copy of his estate book, due on the 24th of October, 1874, and it was further ordered that *Simmons* should be disallowed all remuneration as trustee of the estate. The latter part of the order was made by the Judge without any application for it on the part of any one. On the 12th of February, 1876, *Simmons* gave notice of his intention to apply to the Court on the 18th of February to rehear the application of the Comptroller, and to rescind the order so far as it disallowed the remuneration of *Simmons* as trustee. This application was heard on the 8th of March, and was dismissed. *Simmons* appealed.

Argument.

Doria, for the Appellant:—

The rehearing could have been properly granted: *Bankruptcy Act*, 1869, s. 713; *Ex parte London and County Banking Company* (1). The Judge ought not to have made an order which was not asked, and certainly he had no power to disallow the remuneration which had been sanctioned by the creditors: *Bankruptcy Act*, 1869, ss. 14, 55; Bankruptcy Rules, 1870, rr. 121, 243, 246, 247, 251 (2).

(1) Law Rep. 16 Eq. 391.

(2) Sect. 14 provides that the creditors of a bankrupt shall appoint a trustee "at such remuneration as they may from time to time determine, if any."

By sect. 55, "The trustee, having had his quarterly statement of accounts audited by the committee of inspection, shall, within the prescribed time, forward the certified statement in the prescribed form to an officer to be called the Comptroller in Bankruptcy, and if he fail to do so he shall be deemed guilty of a contempt of Court to be punishable accordingly."

Rule 121: "Where a trustee resigns, dies, or is removed prior to obtaining his release, the creditors shall determine what, if any, remuneration shall be paid for the services which he may have rendered."

By rule 242, the trustee is required to keep a book, to be entitled "The Record."

Rule 243: "The trustee shall also

Bagley, for the Comptroller, was not called upon.

BACON, C.J.:—

The first question really is, whether, an order having been made by the Judge, an appeal from it can be brought after the expiration of the time limited for that purpose by the Rules. I have a very clear recollection of the case to which Mr. *Doria* has referred. The great danger of permitting a rehearing, where the real object was to appeal after the time for doing so had expired, was present to my mind then. But that was the case of a very complicated security; there had been no such concluded decision upon it as could deprive the Court of the power of rehearing the matter if it thought fit to do so, and there was no ground for saying that the object of asking for a rehearing was simply in order to be able to appeal. In the present case the Appellant did not think fit to appear in person to explain his conduct, and he made no application for a rehearing till after the expiration of twenty-one days from the making of the order. On the question of time, therefore, I have no hesitation in saying that his appeal is brought too late. But, setting that aside, I have no doubt that the Judge had a right to

keep a book to be entitled the "Estate Book," according to the form in the schedule, in which he shall enter from day to day the receipts and payments made by him."

Rule 245: "The trustee shall submit the Record and Estate Book, together with a copy of the latter, to the committee of inspection, at the quarterly meeting required by sect. 20 of the Act."

Rule 246: "The committee of inspection shall audit the Estate Book, and certify therein under their hands the day on which the said book was audited, and shall in like manner certify the copy of the said book."

By rule 247, "The trustee shall, forthwith after the said audit shall have been held, transmit to the Comptroller in Bankruptcy the copy so certified, adding thereto his certificate that it is the copy certified by the committee."

Rule 251: "The Comptroller shall take cognizance of the conduct of trustees, and in the event of any trustee not faithfully performing his duties, and duly observing all the requirements imposed on him by statute, rules, or otherwise, relative to the performance of his duties, or in the event of any complaint being made to the Comptroller by any creditor in regard thereto, he shall inquire into the same, and if not satisfied with the explanation given, he shall report thereon to the Court, which, after hearing the trustee, may remove him from his office, or otherwise make such order in the matter as the justice of the case may require."

C. J. B.
1876
In re LISTER. *Ex parte* SIMMONS.

take the whole matter into his consideration, and that he was in no way bound by the resolutions of the committee of inspection and the creditors, who, in the belief that the trustee had faithfully performed his duty, voted him a remuneration of £30. He had not in fact performed the implied condition on which this sum had been given to him. I have no doubt of the jurisdiction to make the order, and the trustee who has so acted has no right to complain of it. I think that the Judge was quite right in refusing to rehear the matter. The appeal must be dismissed with costs.

Solicitor for Appellant: *J. Banks Pittman.*
Solicitor for Comptroller: *W. W. Aldridge.*

DAWSON *v.* OLIVER-MASSEY.

C. A.
1876
M. R.
March 27, 28.
C. A.
April 7.

[1869 D. 37.]

Will—Gift to Class in Remainder—Period of Distribution—Ascertainment of Class—Marriage with Consent of Parents—Impossible Condition.

A testator bequeathed a fund to trustees upon trust, after the determination of a life interest, to pay and transfer the trust property equally among the female children of his sister on their attaining twenty-one or marrying with the consent of their parents. At the death of the tenant for life the testator's sister was a widow and had two daughters, the elder of whom afterwards married while under age, with the consent of her mother:—

Held, that the class to take must be ascertained when the first member became absolutely entitled to a share:

Held (reversing the decision of the Master of the Rolls), that the consent mentioned in the will must be taken to be that of the parents or parent if any, and that the daughter who had married with the consent of her surviving parent took a vested interest in the fund.

Statement.

AUGUSTUS SHAKESPEAR OLIVER-MASSEY, by his will, dated the 5th of November, 1862, after bequeathing some pecuniary legacies of large amount, devised and bequeathed unto and to the use of *Thomas James Brown* and *Richard Dawson*, their heirs, executors, administrators, and assigns respectively, the residue of his personal property and all his real property and estate, upon trust out of the annual income and produce thereof to pay to certain persons therein named, during their respective lives, the annuities therein mentioned; and, subject to the said annuities, to pay the residue or the whole, as the case might be, of the said annual income and produce to *Richard Mansel Oliver-Massey* during his life, and after his decease upon the following trust: "Upon trust to pay, transfer, and convey the said trust property and estate, and the annual income and produce thereof, to be equally divided amongst the female children of my sister *Madeline Elizabeth Sheriffe*, share and share alike, on their attaining the age of twenty-one years or marrying with the consent of their parents, for their sole and separate use, free from the debts and control of any husband with whom they may intermarry, their receipts alone to be sufficient discharges for the same." In other parts of the will the testator spoke of the "trustees or trustee."

C. A. 1876 — DAWSON v. OLIVER-MASSEY.

Statement.

The testator died in August, 1865. He was entitled to very considerable real and personal estate.

Richard Mansel Oliver-Massey died in September, 1870.

The testator's sister, *Madeline Elizabeth Sheriffe*, had been twice married. By her first husband (who was living at the date of the will, but died in the testator's lifetime) she had issue two daughters and two sons; by her second husband she had issue a son only. Her two daughters were still infants. In August, 1875, the elder of them, with her mother's consent, had married *Henry Walter Musgrove Bonham*, and on her marriage a settlement of her interest under the will was made with the approval of the Court.

A petition was then presented by Mr. and Mrs. *Bonham* and the trustees of their marriage settlement, praying that the trustees of the will might be directed to pay and transfer to the trustee of Mrs. *Bonham's* marriage settlement one moiety of the testator's residuary personal estate, after providing for payment of the annuities given by the will and certain other charges thereon.

The petition came on to be heard before the Master of the Rolls on the 27th of March, 1876.

Argument.

Herbert Lake, for the Petitioners:—

The class of children to take is ascertained when the first member of it attains a vested interest: *Hawkins* on Wills (1); *Jarman* on Wills (2). Mrs. *Bonham* attained a vested interest on marrying with her mother's consent: *Roper* on Legacies (3).

Ingle Joyce, for the Respondents.

Judgment, M.R.

JESSEL, M.R.:—

In my opinion both questions raised by the petition may be fairly considered settled, though there appears to be no case in point as regards the first of them.

The gift is this:—[His Lordship read it and continued:—] It is a gift after a life interest to the female children of the testator's sister on attaining twenty-one, or marrying before twenty-one with the consent of their parents.

(1) Page 76. (2) 3rd Ed. vol. ii. p. 146.
(3) 4th Ed. p. 802.

I think it plain that marriage with the consent of the parents is a condition precedent; it is part of the description of the event in which a child is to take.

Now, at the death of the tenant for life, there were two children who could take. Both were infants and unmarried; and their father was dead. Subsequently one of them, being still an infant, married. She could not marry with the consent of her parents, in the plural, her father being dead. The first point to be considered is, whether she has attained a vested interest. She has not attained twenty-one, nor married with the consent of her parents, one being dead. If that be a condition precedent, the rule is that where a condition precedent annexed to a legacy becomes impossible by the act of God, the legatee takes nothing. It is otherwise if the condition is a condition subsequent; there the legatee takes absolutely, because there is nothing to take the legacy away from him. The question then is, whether the consent of one parent will do.

There are two cases which appear to me to decide the point. The first is that of *Knight* v. *Cameron* (1). There the legacy was to be paid to the legatee as soon as she attained the age of twenty-one or upon her marriage with the consent of the executors. There were two executors whose consent was required to the marriage, and one of them died before the legatee married. It was admitted on all hands that the latter branch of the condition had become impossible. It was not even suggested that it was a case in which the office of executor would survive; and that argument would not apply to a case where (as in the present) the consent of parents was required. It was held that the consent of one executor would not do, and that the gift being to the young lady at twenty-one or on marriage with the consent of two executors, she must wait till she attained twenty-one.

That case having been so decided, I next come to *Collett* v. *Collett* (2), where Lord *Romilly* held a condition as to marriage with consent to be a condition subsequent. He says: "I think it clear beyond controversy that this was a legacy vested in Mrs. *Lloyd* immediately on the death of her father, liable to be divested

(1) 14 Ves. 389. (2) 35 Beav. 312. 12 Jur. N.S. 180

C. A. 1876 DAWSON v. OLIVER-MASSEY. Judgment, M.R.

in case she died under twenty-one without having been married with the consent of her mother." Then he points out that this circumstance distinguished the case from *Knight* v. *Cameron* (1), in which there was not a vested legacy, and there was an insuperable direction that the condition must be performed to qualify the person to become entitled to the legacy.

With these two authorities before me, I think that, the condition being a condition precedent, and not having been performed, the Petitioners are not entitled to a transfer of the fund.

The next question is, can anybody else become entitled to a share of the fund?

At the death of the tenant for life there was nobody within the description of the persons to take. It has been settled as a rule of convenience, in cases of this sort, that where the first person becomes entitled, you stop the increase of the class; otherwise the party who had become entitled would not be able to get his share; therefore you ascertain at that moment the least share which a person becoming entitled can take. That being so, I think that where one member of the class becomes entitled, no child who afterwards comes into existence can take a share. The rule is, that the period of distribution depends on the time when the first member of the class becomes entitled.

C. A.

From this decision Mr. and Mrs. *Bonham* appealed, and the appeal came on to be heard on the 7th of April, 1876.

Argument.

Cookson, Q.C., and *H. Lake*, for the Appellants:—

We submit that the condition has been sufficiently complied with. The cases on consent to marriage proceed on this principle, that substantial compliance with the condition is enough. No case closely resembles the present in its circumstances, but the principle of the authorities justifies the Court in reading the condition here as meaning "with the consent of the person or persons for the time being filling the parental office." The point did not arise in *Knight* v. *Cameron*. The real consent required is that of the sister, not of her husband. It would be too absurd to hold that the children of a second marriage could marry, but not those

(1) 14 Ves. 389.

of the first marriage. The text writers all agree that in such a case the consent of the surviving parent would be sufficient: *Rop.* Leg. (1); *Williams* on Executors (2); *Story*, Eq. Jur. (3); *Swinburne* (4). The cases of *Farmer* v. *Compton* (5), *Mercer* v. *Hall* (6), *Clark* v. *Lucy* (7), shew that where a condition becomes impossible it must be performed as well as it can. In *Worthington* v. *Evans* (8) "trustees" was read "trustee," so here "parents" must be read "parent." *Graydon* v. *Hicks* (9), *Co. Litt.* (10), are authorities on the subject.

Ingle Joyce, for the trustees.

Fischer, Q.C., and *R. Lake*, for the executors:—

This question must be raised, as Mrs. *Bonham* may die before she attains the age of twenty-one years. The language of the will is too strong to be got over, however inconvenient it may be. The testator must have known that his own sister's husband was dead, and if he did not alter his will, that shews that he meant it to be as we find it. In other parts of the will he speaks of "trustees or trustee," shewing that he understood the difference. This is clearly a condition precedent, and the Petitioner is not within the terms: *Hemmings* v. *Munckley* (11). Where the act of God renders the performance of a condition impossible, the legacy fails, and the fact that the intended legatee has done all that he can is immaterial: *Falkland* v. *Bertie* (12); *Clark* v. *Parker* (13); *Boyce* v. *Boyce* (14); *Priestley* v. *Holgate* (15). *Green* v. *Green* (16) is a strong decision, and cannot be reconciled with *Sugden* on Powers (17). In some cases a condition precedent which cannot be performed prevents a legacy from vesting: *Swinburne* (18); *Sykes* v. *Sheard* (19). The Court cannot strain the words of the will to

(1) 4th Ed. p. 802.
(2) 7th Ed. p. 1278.
(3) § 291.
(4) 7th Ed. p. 416.
(5) Rep. in Ch. 1.
(6) 4 Bro. C. C. 326.
(7) 5 Vin. Abr. 87.
(8) 1 S. & S. 165.
(9) 2 Atk. 16.
(10) Page 112 a, n.
(11) 1 Bro. C. C. 304.
(12) 2 Vern. 333.
(13) 19 Ves. 1.
(14) 16 Sim. 476.
(15) 3 K. & J. 286. 3 Jur NS. 486.
(16) 2 J. & Lat. 529.
(17) 8th Ed. p. 252.
(18) 7th Ed. p. 401.
(19) 33 L. J. (Ch.) 181. 1 Ld Cas. 6. 9 Jur NS 806, 1262.

C. A. 1876

DAWSON v. OLIVER-MASSEY.

mean what they do not say. In *Collett* v. *Collett* (1) the condition was subsequent.

Cookson, in reply.

Judgment, C. A. James, L.J.

April 7. JAMES, L.J., after stating the facts of the case:—

The law upon the subject is expressed in Mr. *Roper's* book on Legacies, or rather in Mr. *White's* original edition of *Roper* which was published in 1828. The previous edition of Mr. *Roper* himself, who was dead before this time, was in 1805, but it appears from the preface to the edition of 1828, that the chapter from which I am about to read was written by Mr. *Roper* himself, who must have spent a considerable portion of his life in getting up the subject of the Law of Legacies. He states it thus (2): "There is, however, a peculiarity belonging to those conditions when the legacies are the subjects, which makes the rules of the common law inapplicable to them in every instance. This anomaly is produced from the adoption of the civil law in the construction of personal bequests to a certain extent, according to which, where the condition is precedent, it is considered to be performed within the meaning of the testator if executed *cy-près* when the whole cannot be literally fulfilled from unavoidable circumstances. The principle is the presumption of the testator not requiring the performance of impossibilities, and that his intention will be substantially carried into effect by permitting it to be executed as far as it can be done." And after some further general observations, he proceeds (3): "It follows from these observations that if a precedent condition require the consent of three trustees to the marriage of the legatee and one of them die, the approbation of the survivors previously to the marriage will be a sufficient compliance with the condition. For although the testator must have supposed that all his trustees would be living at the time of the legatee's marriage, or he would not have required their joint consent, yet doubtless he could not mean that by the accident of the death of one of them his bounty, or it may be his obligation as a parent, should be dis-

(1) 35 Beav. 312. 12 Jur. N.S. 180 (2) 3rd Ed. p. 690.
(3) 3rd Ed. p. 691; 4th Ed. p. 802.

appointed. It may be reasonably presumed that if the possibility of one of the trustees dying before it was necessary to consult him on the marriage had occurred to the testator, he would have expressly empowered the survivors to consent or disapprove of it. And since a prudent connection was the essence of the condition, and the object was attainable in securing it by the previous consent of the two trustees, the case seems to fall under the exception in the civil law to a strict performance of the condition, namely, when a testator appears to have more regard to the end than to the means prescribed for its attainment."

Mr. Justice *Vaughan Williams*, in his book on Executors, says this (1): "Next, concerning the performance of conditions in restraint of marriage. In the instances of conditions requiring marriage with consent of executors or trustees, it has been decided that such consent must be obtained before or at the marriage; for a subsequent approbation by the executors, &c., will not be a performance of the condition. Again, the consent of all the executors or trustees must be obtained, though, where one of them is dead, if the condition is precedent it should seem that the consent of all the survivors is sufficient."

Mr. Justice *Story* puts it somewhat differently. Mr. Justice *Story* says (2): "Where a literal compliance with the condition becomes impossible from unavoidable circumstances and without any default of the party, it is sufficient that it is complied with as nearly as it practically can be, or (as it is technically called) *cy-près*. This modification is derived from the civil law, and stands upon the presumption that the donor could not intend to require impossibilities, but only a substantial compliance with his directions as far as they should admit of being fairly carried into execution. It is upon this ground that Courts of Equity constantly hold in cases of personal legacies that a substantial compliance with the condition satisfies it, although not literally fulfilled. Thus if a legacy upon a condition precedent should require the consent of three persons to a marriage, and one or more of them should die, the consent of the survivor or survivors would be deemed a sufficient compliance with the condition, and *à fortiori* this doctrine would be applied to conditions subsequent."

(1) Wms. Exors. 1278, 7th Ed. (2) Story, Eq. Jur. § 291.

C. A.
1876
DAWSON
v.
OLIVER-MASSEY.

Judgment, C.A.
James, L.J.

Therefore, at least from the year 1828 down to the present time, wherever the English language is spoken, wherever the English law prevails, and the English legal literature has been studied, it has been taught and accepted as the unquestioned doctrine of this Court that the death of one of two persons whose consent is required does not destroy the gift, and that the consent of the survivor is sufficient. Lord *St. Leonards*, in the case of *Green* v. *Green* (1), has carried it even further, because dealing with a question as to land, which is supposed to be not subject to the civil law, on which these cases to some extent proceeded, he has decided that where a man had the power of jointuring any wife he should marry with the consent of *A. B.*, the death of *A. B.* did not prevent him from jointuring a wife with whom he afterwards intermarried.

On the other hand, it is said, and it seems to have been thought by the Master of the Rolls, in dealing with this petition, that the two authorities to which he referred were decided the other way. One was the case of *Knight* v. *Cameron* (2), decided in 1807 by Sir *W. Grant*, but in that case the point was not only not decided, but could not have been decided. The consent required was of two executors, one of whom was dead, and the lady married without the consent of the other. All that the Master of the Rolls decided in that case was that she had not married with consent; there was no decision, and there was no *dictum* to the effect that marriage with the consent of the survivor would not have been a sufficient compliance with the condition.

The other case is *Collett* v. *Collett* (3), before the late Master of the Rolls; but when that comes to be considered, so far from being an authority the other way, or recognising, as was supposed, *Knight* v. *Cameron* as being an authority the other way, the decision is really, as far as it goes, a strong authority in favour of the proposition contended for by the Petitioner in this case. For there a testator gave a share of his residuary real and personal estate to his daughter, to be paid at the age of twenty-one years, or on her day of marriage, provided it should take place with the consent of his widow; the widow died; the daughter

(1) 2 J. & Lat. 529. (2) 14 Ves. 389.
(3) 35 Beav. 312.

married under age, consequently without the consent of the widow, and the Master of the Rolls ordered the money to be paid out to the daughter on her marriage, no doubt treating it as a condition subsequent, and he uses this language (1): "I think that this is the true and proper conclusion to be drawn from the cases which decide that when the performance of the condition *in toto* has not taken place because the performance of a portion of the condition has become impossible through no act or default of the person who had to perform it, the performance of that portion of the condition will be dispensed with. Here, it is reasonably certain"—which is singularly like this case—"that the mother, if she had lived, would have given her consent to this marriage; one eligible in all respects, approved of by the friends and guardian of the lady herself, and sanctioned by the Court. She has, therefore, performed the condition as far as it was possible for her to do so, but the consent of the deceased mother of course could not be procured."

Judgment, C.A. James, L.J.

This being the state of the law of the Court and of the authorities, I think we are well warranted in putting a reasonable construction upon this will and in supposing that the testator was a man of ordinary common sense, and that he meant not to prevent the young lady from marrying under the age of twenty-one years, in the event of the death of one of the parents, but that the marriage should be substantially with proper parental consent, and that we are authorized in saying that it must be implied that the marriage was to be with the consent of the parents or parent, if any. *Qui hæret in literâ hæret in cortice.* And there probably never was a stronger illustration of how impossible it would be, consistently with sense, to give a literal construction to a bequest than is exhibited in this particular bequest. There is not a line in this gift which can be literally construed and made sensible, for there is no gift, except a gift by division between children; therefore there would be no gift to one child only if there had been only one daughter. Then, again, the only direction is for a division on their attaining the age of twenty-one years or marrying. Beyond all question "division" does not mean "division," and "their" does not mean "their," because, unless you assume the event of a

(1) 35 Beav. 312.

C. A.
1876
DAWSON
v.
OLIVER-
MASSEY.

Judgment, C.A.
James, L.J.

daughter attaining the age of twenty-one, and the other daughter marrying at that same time, there never would be any division at all, and the share of the daughter, so far as it was then ascertained, would be paid to her, not on "their" attaining the age of twenty-one or "their" marrying with consent, but on "her" attaining the age of twenty-one or "her" marrying with consent. Another absurdity mentioned in the argument would arise on this will, that assuming the case to be, as it might very well happen, that the lady might marry more than once, and the lady so marrying might have some other daughters, then there would be this absurdity, that the daughters of the first marriage never could marry with consent, though the daughters of the second marriage could.

I do not base my opinion upon those reasons, but I refer to them as illustrating the propriety of the doctrine, that we must treat the thing reasonably, and say that the consent must be the consent of the parents or parent, if any. Therefore, I am of opinion that the Petitioners are entitled to have what they have asked for.

MELLISH, L.J.:—

I am of the same opinion.

BAGGALLAY, J.A.:—

I do not think it necessary to add anything.

Solicitors: *Lakes, Beaumont, and Lake; Sladen & Mackenzie.*

In re SOUTH WALES ATLANTIC STEAMSHIP COMPANY.

C. A.
1875
V.-C. M.
July 26.
C. A.
1876.
April 7, 8, 10, 12.

Companies Act, 1862, ss. 4, 199—*Winding-up—Unregistered Company of more than Twenty Members.*

A company for establishing a service of steamers was formed in 1871 with more than twenty members, and was not registered. In 1873 it made over its assets and liabilities to a limited company, which was unsuccessful, and passed a resolution for winding up. The solicitors who had acted for the unregistered company sent in a bill consisting of costs incurred about the formation of that company, costs incurred in defending actions brought against some of the members which the solicitors were retained by the manager and committee of the company to defend, and other costs for work done in the carrying on of the company on the like retainer:—

Held (affirming the decision of *Malins*, V.C.), that the solicitors could not obtain an order to wind up the company, for that, as the company was illegal, no legal debt arose in respect of that part of their demand which related to the formation of the company, or was immediately connected with carrying it on; and, as to the rest, the solicitors could not shew that they were retained on behalf of all the members except by producing a deed of settlement, which was on the face of it illegal.

Whether an order can be made for winding up such an illegal association on the application either of members or creditors, *quære*.

Statement.

IN this case there were separate appeals from decisions of Vice-Chancellor *Malins* and Vice-Chancellor *Hall*, each of whom had dismissed a petition for winding up.

By articles of agreement, dated the 25th of January, 1871, reciting that the parties who had thereto subscribed their names had agreed to join together for the purpose of establishing, under the title of the *South Wales Atlantic Steamship Company*, a service of steamers between *Cardiff* and other ports in the *Bristol Channel* and *New York* and other ports in the *United States of America*, and that a contract had been entered into for the construction of two steamers for £50,000 each, it was stated that the parties (thereinafter called "The Adventurers") had agreed to carry out the undertaking upon the terms thereinafter mentioned, the material terms being to the following effect:—

Clause 1 provided that the capital should be £108,800, divided into 256 shares, and should be contributed by the adventurers in proportion to the number of shares set against their respective

C. A. 1876 *In re* South Wales Atlantic Steamship Co. Statement.

names in the schedule; and the adventurers were to contribute such further sums as might be required for the purposes of the undertaking upon being called on to do so by the manager acting on behalf of the committee thereinafter named.

2. That a shareholder failing to pay his contributions might be sued, or his interest forfeited.

3. The adventurers were to be entitled to the profits in proportion to the shares they held.

4. The vessels were to be registered in such names as the majority of the adventurers might from time to time appoint, and the registered owners were to sign a declaration of trust.

5. The adventurers were, as soon as might be after £75,000 of the capital had been subscribed for, and subsequently from time to time as occasion might arise, to hold a general meeting for the purpose of nominating a committee of superintendence to assist the manager. The committee were to have power to arrange for the settlement and discharge of all preliminary costs and expenses incurrred in the formation and establishment of the undertaking, and also (subject to the terms of the now stating agreement) to provide for the general costs and expenses of the undertaking, and make rules and regulations for carrying on the affairs thereof. The committee was not to consist of more than five, and its decision was to be binding on the whole of the adventurers.

7. The general management of the undertaking was to be vested in the manager, with the assistance of the committee, with whom he was to consult in all cases of importance, and the decision of the manager and committee was to be binding on the adventurers.

14. The arrangement was to be for seven years from the 2nd of January, 1871, and for such further term as the adventurers or a majority of them should from time to time determine, but power was given to the owners of two-thirds of the capital for the time being to stop the concern at any time.

About seventy-eight persons subscribed their names to this agreement, and nearly all paid up the full amount of £425 per share. The whole capital so paid up amounted to £83,160.

In June, 1872, a managing committee was appointed. The capital subscribed was applied towards the objects of the association, and the steamers were completed.

C. A.
1876
In re SOUTH WALES ATLANTIC STEAMSHIP CO.

In July, 1873, meetings were held pursuant to provisions in the agreement, at which it was resolved to dissolve the association, and form a company with limited liability for the same purposes. This was done in May, 1874, and the property of the association made over to the new company. In May, 1875, the new company passed an extraordinary resolution for winding up, on the ground of the company being unable, by reason of its liabilities, to continue its business.

Statement.

Messrs. *Luard & Sherley*, of *Cardiff*, solicitors, were employed in the formation of the association, and acted as its general solicitors till November, 1873, and acted for it to some extent till its dissolution in May, 1874. Early in 1873 they delivered a bill of £122 15*s.* 6*d.* for professional services to the end of 1872, and they afterwards delivered a bill of £354 10*s.* 2*d.* for services from the end of 1872 to May, 1874. Part of the bill consisted of professional charges about forming the association, other part, of the costs of defending actions brought against some of the members of the association for damage to goods carried in their ships, and for other matters incidental to the business, which actions Messrs. *Luard & Sherley* had been retained by the manager and the committee to defend, and the rest for work done in the carrying on of the company on the like retainer. Not being able to obtain payment, they presented a petition to wind up the association. This petition came on to be heard before Vice-Chancellor *Malins* on the 26th of July, 1875.

Glasse, Q.C., and *Grosvenor Woods*, for the Petitioners.

W. Pearson, Q.C., and *B. B. Rogers*, for some of the members of the association who opposed a winding-up.

MALINS, V.C.:—

Judgment, V.-C. M.

This is a very important case, and that such a case should have arisen is, I think, most extraordinary.

It appears that a body of noblemen and gentlemen of the highest consideration—the Marquis of *Bute* at the head of them—such a body of men as I have scarcely ever seen associated together in a company—agreed in the month of January, 1871, to form a company

C. A. 1876 *In re* South Wales Atlantic Steamship Co. Judgment, V.-C. M.

under these circumstances. The deed, which they executed on the 25th of January, 1871, recites: "Whereas the trade and commerce of *Cardiff*, in the county of *Glamorgan*, has during the last forty years very rapidly increased and still is increasing; and whereas up to the present time no regular service of steamships has been engaged between any port in the *Bristol Channel* and the continent of *North America;* and whereas the trade between the manufacturing districts of *South Wales* and *America* has of late years increased, and still is very largely increasing; and whereas the parties who have hereunto subscribed their names have mutually agreed to join together for the purpose of establishing, under the style or title of the *South Wales Atlantic Steamship Company*, a service of steamers between *Cardiff* and the other ports in the *Bristol Channel* and *New York*," and so on; "and whereas a contract has been entered into" to build two steamers for the sum of £50,000 each; "and whereas the several parties (who are hereinafter called the adventurers) have agreed to carry out the aforesaid undertaking, subject to the following provisions;" and it then recites that the capital shall consist of 256 equal shares of £425 each. There are many other stipulations which are not important to refer to for the present purpose, and then come the names of the persons who executed the deed, being, as I have already stated, noblemen and gentlemen of the highest consideration, manufacturers, colliery owners, and all that class of persons, greatly interested in the port of *Cardiff* and the coal trade there carried on.

Now this deed is executed by far more than twenty persons, and, indeed, by more than forty persons, and the company has from the beginning, as I collect, consisted of at least seventy-five persons, and it must have been intended to be an unlimited company, because I do not find the word "limited" used. It does not say that the amount of capital shall be limited; and we know perfectly well that unless parties avail themselves of the Limited Liability Acts all persons entering into partnerships are liable to the last farthing they have in the world. That was the principle of this association. Whether it was intended to be formed on that basis or not, I cannot possibly know; but if it was intended, considering the enormous advantages of the *Companies Act*, 1862, and

the enormous advantages given by that Act to creditors and shareholders, and the facilities it affords in case of difficulty in winding up, it is a most extraordinary thing that such a body of men should have been associated together for such a purpose, involving an outlay of we know not how much, without availing themselves of the limitation of liability under that Act. But so it was. It is clear the company was never registered, and has never been called a limited company; it is "The *South Wales Atlantic Steamship Company*." The Act of Parliament, in the 8th section, provides that in all cases "where a company is formed on the principle of having the liability of its members limited to the amount unpaid on their shares, hereinafter referred to as a company limited by shares, the memorandum of association shall contain the following things, that is to say, the name of the proposed company, with the addition of the word 'limited' as the last word in such name." All men are bound to know the law. Any man in any way connected with business, and who has business transactions with the world, must know, and does know, and must have attributed to him the knowledge of this Act of Parliament, which has become one of the most notorious, from various circumstances, that has ever been put on the statute book. These noblemen and gentlemen must have known, and the solicitors of the company, the Petitioners, must have known, that if they intended this to be a limited company, they were bound to put in their title over the door-post or the window of the offices, or wherever the name was written, the word "limited" as the last word of the name. Not only the shareholders, but all the creditors, are bound to know it, and therefore every person dealing with a company ought to ascertain how long it has existed, whether it existed before 1862, or came into existence afterwards, and whether it is a limited or an unlimited company. And as the shareholders are bound to use the word "limited" if they intend it to be so, the creditors are bound to know it is an unlimited company unless the word "limited" is used. I must attribute to the Petitioners the knowledge that it was unlimited, and was not registered under the Act, because if it was registered under the Act they could have found out the fact. If it is an unlimited company, that fact need not appear. All persons were bound to know whether it was

C. A. 1876

In re South Wales Atlantic Steamship Co.

Judgment, V.-C. M.

a company legal or illegal. Now that this company is, in one sense of the word, an illegal association, can admit of no doubt, because the broad principle of the policy of the Act is clear. The fourth section has enacted: "No company, association, or partnership consisting of more than ten persons shall be formed after the commencement of this Act, for the purpose of carrying on the business of banking, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament, or of letters patent; and no company, association, or partnership consisting of more than twenty persons, shall be formed after the commencement of this Act, for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament, or of letters patent, or is a company engaged in working mines within and subject to the jurisdiction of the Stannaries." All persons, therefore, who are connected with the company were bound to know, and I must attribute the knowledge to them, that the formation of a company consisting of more than twenty persons, for the purpose for which this association was formed, viz., the purpose of gain, by sending coal by steamers from the *Bristol Channel* to the ports of *America*, was a company formed for the purpose of gain, and that they were, therefore, bound to register, and that if they did not register, then, having more than twenty members, it was an illegal association.

Now Mr. *Glasse* admits that, being an illegal association, no application by the shareholders can be entertained. Why is that? Because they have been engaged in an unlawful association, and, being engaged in an unlawful association, this Court will leave them to settle the questions between themselves if they can, and will give no aid to them. Therefore it is conceded, as it is laid down by Mr. Justice *Lindley* in his treatise on Partnership, that "an illegal company cannot be wound up at the instance of its own members, but there is no reason why they should not be wound up at the instance of creditors." Now, why is it that they are not to be wound up at the instance of their own members? Because they have been engaged in an illegal association. Why should it

be wound up upon the application of a creditor who has notice that it is an illegal association? Because the very fact of the omission of the word "limited" shews it is unlimited, and if a man deals with such a company knowing that the universal usage is to register, he is bound to ask why the company is not registered, and how many members it consists of. If it consists of less than twenty, then the 199th section of the Act applies. I have made orders to wind up companies consisting of more than seven and less than twenty members. When the Act of Parliament declares that the act is illegal, can the parties come into Court and seek the aid of the very Act of Parliament which says what they have done is illegal? A shareholder cannot do that. Why should a creditor? I have said over and over again, where creditors having notice of a limited liability will not make inquiries and avail themselves of the knowledge which it is within their power to obtain, they themselves are to blame for giving credit to a company unable to pay. So, if men will deal with a company that is unlimited, and which *primâ facie* must be taken to be illegal because it is not registered, it is clear they have thrown upon them the burden of ascertaining whether it is a legal company or not; and, if they choose to deal with it, must take the consequences, and recover the debt as best they can. Therefore, although my first impression was, and still is, that, as a matter of convenience, considering that there is no moral impropriety in the formation of such a company, it would be better both for the creditors and the shareholders that the liabilities should be ascertained, rateable contribution made, and the winding-up of the company carried on under the provisions of this Act of Parliament—and the great and overwhelming body of shareholders take that view of the case—still, as a few, represented by Mr. *Pearson* and Mr. *Rogers*, take a different view and resist the order to wind up, it is my duty to attend to the legal argument, and make up my mind whether a case is established to wind up this company upon the application of a creditor.

Now I think the fatal objection to this petition is that it is presented by Messrs. *Luard & Sherley*, who were the solicitors of Lord *Bute*, drew the deed, and took all the steps to form the company, and therefore were parties to the formation of an illegal

C. A. 1876

In re South Wales Atlantic Steamship Co.

Judgment, V.-C. M.

company; and whatever may be the position of other creditors, I cannot entertain the slightest doubt that upon an application of creditors so constituted it is impossible that the winding-up order can be made. It was their duty to tell these gentlemen, who were associated together in numbers exceeding the permitted limit to form a company which was not to be registered, that it was prohibited by law, and prohibited upon broad principles of policy. The Act of Parliament says it shall not be done, and it was the duty of the Petitioners to point out the illegality of the act, and they cannot avail themselves of any right founded upon the position they occupy. Upon general principles, although my impression at the commencement was the other way, yet, upon full consideration of the authorities and the principle of the Act of Parliament and the objects it has in view, I come to the conclusion, very much in accordance with what was stated by the Master of the Rolls in *Ex parte Hargrove and Co.* (1), where, although the point was not before him for direct adjudication, he was led to express an opinion upon the subject. There, although an order had been made to wind up the company, he expressed his opinion upon this ground which I proceed upon, that, inasmuch as the formation of such a company is illegal by the Act of Parliament, you cannot come under that Act, which says it is illegal and is prohibited, and avail yourself of that Act, and ask this Court to aid you as if there had been a legal act done. Upon those grounds, it appears to me impossible that any order to wind up can be made, either upon an application of shareholders or creditors, where the company is illegal by the enactment of the Act of Parliament under which alone an order to wind up can be made.

Mr. *Glasse* says it must have been intended originally that this should be an unlimited company. I think so too. It is very odd that any body of men could be found to form themselves into an unlimited company when the protection afforded to the shareholders and the creditors under the *Companies Act* is so great. If, however, they chose to form a company with unlimited liability, the law does not prohibit it, but the law says if you do form a company consisting of twenty members, you must register it under the Act, or it is an illegal association.

(1) Law Rep. 10 Ch. 542.

Then Mr. *Glasse* says, and with some show of reason, that honesty and every feeling of propriety require that those who form such companies should pay the debts. I agree with that. In the well-known case of *Ex parte Meymot* (1) a clergyman, who is prohibited by Act of Parliament from going into commerce, did go into trade and incurred debts. The question was, whether he could set up his own wrong in defence as regards the payment of the debts he had incurred? The rule of the Court is, that a man cannot avail himself of his own wrong, and that if he enters into trade he must take the consequences of so doing. Even if an infant conducts himself in a fraudulent manner, he may be held liable to pay debts contracted by him as if he were of full age. That was decided in a case before Lord Justice *Knight Bruce*, in which the liability to pay debts was established against an infant, because he represented himself of full age, and had been guilty of fraudulent conduct.

The authorities which were cited by Mr. *Pearson* all agree that where there is an illegal association as between themselves, the parties cannot have any relief except in that case mentioned by Mr. *Glasse* of *Sharp* v. *Taylor* (2), where Lord *Cottenham* allowed a suit to be sustained for obtaining contribution, not for relief under an illegal contract, but to adjust the rights of the parties after the transaction had taken place. It was a smuggling transaction. Those cases have no application to this, which depends upon a positive prohibition by Act of Parliament, and although Mr. Justice *Lindley* does say there is no reason why they should not be wound up at the instance of creditors, I cannot think that in that particular passage Mr. Justice *Lindley* had his attention sufficiently drawn to the fact that the 4th section of the Act prohibits those associations. The case he relies upon as the best authority is *Ex parte Longworth's Executors* (3), where it does not seem that the company was absolutely illegal. That, I think, appears plain from the judgment in both Courts. The company had done an illegal act. It had proceeded in business before obtaining half the capital, a course which was prohibited, but, inasmuch as it had done so and incurred debts, the Court refused to interfere with the proceedings of the creditors; but I cannot help

(1) 1 Atk. 196. (2) 2 Ph. 801. (3) Joh. 465.

C. A. 1876 *In re* South Wales Atlantic Steamship Co. Judgment, V.-C. M.

thinking that if it had been a case like this, where the machinery of the Act of Parliament was invoked by those who had been guilty of an illegal act in forming a company of this kind, the result would have been totally different. There is no other case that gives any sanction to this application, and I come to the conclusion that all such associations as this are illegal, and that, whatever the rights of the parties in other respects are, it is impossible for those engaged in the matter to invoke the aid of the Act of Parliament, which itself declares the act illegal. It would be absurd to say that you could come into this Court under an Act which says you are an illegal association, and get the same relief as if it was legal. No doubt the position of creditors is more favourable than that of shareholders; but still, in my opinion, whether they are ship-builders, or whether it be even the banking company who are creditors for £31,000, they were bound to know that it was not a registered association, that there were more than twenty members, and that, therefore, it was an illegal association. The result will be that, having given credit, they must recover the money from those to whom they gave credit. If they make out a case against them all, and establish a liability, they will get it at law, but it is impossible for them to do so under the machinery of this Act. I very much regret it, but I feel myself constrained to dismiss this petition with costs.

C. A.

Another petition for winding up the association was presented by the *Great Western Railway Company*, who claimed to be creditors for the carriage of goods for the association. This petition was dismissed by Vice-Chancellor *Hall*, who considered the decision of Vice-Chancellor *Malins* binding on him.

The *Great Western Railway Company* and *Luard & Co.* severally appealed.

Argument.

Dickinson, Q.C., and *Grosvenor Woods*, for the appeal of the *Great Western Railway Company*:—

Vice-Chancellor *Hall* decided this case on the authority of the decision of Vice-Chancellor *Malins*, without giving any opinion of his own. But the decision of Vice-Chancellor *Malins* goes mainly

on the ground that the Petitioners must have known that the company was an illegal one. That does not apply in our case, there being nothing to fix the *Great Western Railway Company* with notice of the number of members of the association. Then Vice-Chancellor *Malins* says we are asking the assistance of the Court under a particular Act of Parliament in respect of a company forbidden by the Act. Now it may well be that persons concurring in something forbidden by the Act cannot avail themselves of its provisions. The arguments which apply to members of the association do not apply to outside creditors.

[Mellish, L.J.:—The question is whether an association of this kind is excluded from sect. 199 of the *Companies Act*, 1862, by virtue of sect. 4.]

We submit that it is not excluded. The Act imposes no penalties on the persons who form an association of this kind. It is a curious state of the law if the result of the illegality of such an association is that it has a power of baffling its creditors which a legally constituted company does not possess. The Act of 1862 was not, like some of the former Acts, intended merely for the benefit of shareholders, it was intended also to benefit creditors; and is a person who, without any notice of illegality, becomes a creditor of the association, to be left without remedy? Winding-up is now a remedy for creditors. The opinion of *Lindley*, J., is in our favour: *Lindley* on Partnership (1). It is argued against us that we are approbating and reprobating by applying the Act to a company forbidden by the Act, but that is not so; we are not seeking relief in respect of anything forbidden by the Act. The Act authorizes the winding-up of unregistered companies, and does not exclude such a one as this.

[Baggallay, J.A.:—May not sect. 199 be considered as applying only to companies which are registered or may register, not to companies which are illegal?]

The observations of the Master of the Rolls in *Ex parte Hargrove & Co.* (2) are against us; but there are observations in our favour in *Ex parte Longworth's Executors* (3), and against

(1) 3rd Ed. 1268.
(2) Law Rep. 10 Ch. 542.
(3) Joh. 465; 1 D. F. & J. 17.

C. A. 1876 *In re* South Wales Atlantic Steamship Co. Argument.

the extra-judicial remarks of the Master of the Rolls may be set the observations of *Lindley*, J., and the terms of sect. 199, which ought to be taken in their natural meaning.

The evidence as to the debt was then gone into, and did not satisfy the Court that there was such a debt as would support a winding-up order in the case of a legal company, and on this ground, without any opinion being given as to the point of law, the appeal was dismissed without calling on the Respondents.

Glasse, Q.C., and *Grosvenor Woods*, in support of the appeal of *Luard & Co.*:—

There is nothing in the Act to render the company illegal except as between the members.

[Mellish, L.J.:—Can the company be illegal as regards the members and not for all purposes?]

In *In re Hertfordshire Brewery Company* (1) the Master of the Rolls wound up a company not duly constituted. Surely the company cannot be allowed to allege their own illegality as a reason for not paying their debts. The Act was intended to affect the privileges of the association if the statutory requirements were not satisfied, but not to affect its liabilities: *Ex parte Meymot* (2); *Ex parte Longworth's Executors* (3); *In re West Surrey Tanning Company* (4); *In re London and County Coal Company* (5); *In re Sanderson's Patents Association* (6); *In re Adansonia Fibre Company* (7). Sect. 199 provides for winding up any unregistered association, and this is an unregistered association.

[Baggallay, J.A.:—Is not this in substance the petition of contributories? It is for the benefit of some of the contributories that the solicitors should seek relief in this way rather than by suing the persons who retained them.]

The Petitioners wish, if they can, to make all the members contribute under the Act. Those who have paid have an equity against the rest: *In re Beulah Park Estate* (8). In *Cobb* v.

(1) 43 L. J. (Ch.) 358.
(2) 1 Atk. 196, 199.
(3) Joh. 465; 1 D. F. & J. 17.
(4) Law Rep. 2 Eq. 737.
(5) Law Rep. 3 Eq. 355.
(6) Ibid. 12 Eq. 188.
(7) Ibid. 9 Ch. 635.
(8) Ibid. 15 Eq. 43.

W.N.(1876) 38; 24 W.R. 259

Symonds (1) illegal trading was held to make a man a trader within the *Bankruptcy Act*. In *Ex parte Lynch* (2) it was held that an infant who had traded could be made a bankrupt notwithstanding the *Infants' Relief Act*. Winding up is a statutory execution. Members must contribute to debts incurred before they joined the association: *Taylor* v. *Ifill* (3).

[Mellish, L.J.:—Suppose a person joined an association of this kind while the members were fewer than twenty, and they afterwards became more than twenty, would not his proper remedy be to ask the Court to stop the concern?]

Considering the number of members here, it cannot be considered that the ordinary rule of partnership was intended to apply, viz., that a partner is only liable for debts incurred after he joined the concern: *Rolfe* v. *Flower & Co.* (4). Moreover, there was only one change of ownership, so the question has little practical importance in this case. If a company can plead its own illegality, people may set up a partnerhip of more than twenty, conduct its affairs by means of a manager who has no property, and have the profits as long as it is prosperous, and then, if it fails, repudiate all liability, on the ground that the manager alone entered into contracts.

Whitehorne, for the manager and the committee, supported the appeal.

W. Pearson, Q.C., and *B. B. Rogers*, for two members who opposed the petition:—

This is an illegal company, and the Petitioners, being its solicitors, must be taken to have been aware of this. They are *participes criminis*, and have no good debt. Under the *Companies Act*, 1862, s. 4, the company being illegal, the remedy of the creditors is wholly outside the Act. Here, moreover, the employment of the solicitors was to do an illegal thing: *Duvergier* v. *Fellowes* (5); *Josephs* v. *Pebrer* (6); and no legal demand can arise out of it. But even if any part of the employment was to

(1) 5 B. & A. 516.
(2) *Ante*, p. 227.
(3) 1 N. R. 566.
(4) Law Rep. 1 P. C. 27.
(5) 1 Cl. & F. 39.
(6) 3 B. & C. 639.

C. A. 1876

In re South Wales Atlantic Steamship Co.

Argument.

do something not illegal, it is impossible to prove a retainer on behalf of all the members of the association, for there is no evidence of the authority of the manager and committee to bind the others, except the agreement constituting the company, and this being illegal, cannot be looked at for this purpose. It cannot, being illegal, give any such authority. The only authority on the effect of sect. 4 is *Harris* v. *Amery* (1), and that is in our favour. The law cannot recognise the association as an association.

[James, L.J.:—Suppose a person repents of having joined an illegal association, can he not have it wound up?]

We submit not.

[James, L.J.:—Suppose more than twenty persons employ a manager who is a pauper, and incur large debts. Can they say to a creditor, Your only remedy is against the manager?]

We submit that they can, for every one who deals with persons professing to act as a company is bound at his peril to ascertain its constitution. There are here no contracts binding on all the members: *Riche* v. *Ashbury Railway Carriage Company* (2); *In re London Marine Insurance Association* (3). It is not the business of the Court to wind up individuals, and there is no association, since there is no bond of union but an illegal instrument, which cannot be looked at. How could a winding-up be proceeded with? The Court would have to ascertain who were liable on each contract, and would probably have to go through all the combinations that could be made of seventy-eight persons. There is no continuity: *Melhado* v. *Porto Alegre Railway Company* (4); *Eley* v. *Positive Assurance Company* (5); *Thomson* v. *Thomson* (6); *Ewing* v. *Osbaldiston* (7). If there is any power to wind up it must be under sect. 199. "Association" there must mean legal association, otherwise we should have the Legislature dealing with something which it has declared shall not exist.

[James, L.J.:—That seems a strong reason for winding it up, that it may no longer exist.

(1) Law Rep. 1 C. P. 148. (4) Law Rep. 9 C. P. 503.
(2) Ibid. 9 Ex. 224. (5) 1 Ex. D. 20.
(3) Ibid. 8 Eq. 176, 195. (6) 7 Ves. 470.
(7) 2 My. & Cr. 53.

BAGGALLAY, J.A.:—Section 180 speaks of an association "duly constituted according to law," and implies that other associations were within its purview.

MELLISH, L.J.:—Are we to interpolate into clause 199 the words "not consisting of more than twenty members"?]

There are legal companies which satisfy the words, and forbidden companies ought not to be held included. There is not a case to be found where the Court, after argument, has ordered the winding-up of an illegal company. The question has been raised at other stages, but not at the hearing: *Ex parte Longworth's Executors* (1); *In re Family Endowment Society* (2); *Barclay's Case* (3); *Fenn's Case* (4); *Grisewood's Case* (5); *In re Bank of London Insurance Association* (6).

[MELLISH, L.J.:—Cases before the Act of 1862 cannot throw much light on the question.]

The only case since the Act is *Ex parte Hargrove & Co.* (7).

[BAGGALLAY, J.A., referred to *Ex parte Williamson* (8).]

Grosvenor Woods, in reply:—

The cases go no further than this, that the parties to an illegal agreement cannot enforce any claim to make out which they must produce the agreement. This does not affect third parties. An illegal partnership has been held to give a creditor a remedy against a concealed partner: *Brett* v. *Beckwith* (9). In *Sheppard* v. *Oxenford* (10) it was held that there was a right to have the assets of a company secured, though it was an illegal one. In *Harris* v. *Amery* (11) there was no question of creditors. It is contended that there is a succession of different partnerships, but the parties went as near as they could to the constitution of a company; each new partner came in upon the footing of taking the concern as he found it, and being liable to its then debts, and a person who

(1) Joh. 465; 1 D. F. & J. 17.
(2) Law Rep. 5 Ch. 118.
(3) 26 Beav. 177.
(4) 4 D. M. & G. 285.
(5) 4 De G. & J. 544.
(6) Law Rep. 6 Ch. 421.
(7) Ibid. 10 Ch. 542.
(8) Ibid. 5 Ch. 309.
(9) 3 Jur. (N.S.) 31.
(10) 1 K. & J. 491.
(11) Law Rep. 1 C. P. 148.

C. A. 1876 *In re* South Wales Atlantic Steamship Co.

went out was to be indemnified. There is no reason, therefore, why, as regards the creditors, the association should not be wound up just as if it had been a legal one.

Judgment, C. A. James, L.J.

April 12. James, L.J.:—

In this case, in my opinion, the Petitioners have failed to establish a sufficient legal debt to entitle them to the winding-up order which they seek. With regard to the first part of their bill of costs, it appears to have been in truth incurred in establishing a body which was illegal, in forming the constitution of that body, and assisting it in coming into existence. In my opinion, it is impossible to say that any legal demand could be founded on such an employment. With regard to the subsequent part of the bill of costs, it is alleged by the Petitioners themselves that they did the work on the retainer, and by the direction, of the manager and committee of the association. Now, no doubt, a manager of such a body may possibly be held out to the world, like the manager of a manufactory, or a ship, or anything of that kind, as having authority to do what is the ordinary routine work of such an employment, and may bind his principals by the thing done in such ordinary work; but it is no part of the ordinary duty of a traffic manager to employ an attorney or solicitor, and the agency of the manager and of the committee must be shewn. In this case it is shewn merely by an article in the constitution of the body itself, which delegates to such manager and committee certain powers. Now, the whole constitution of the body being illegal and void, it appears to me that the agency created by such a constitution is void also, and therefore that the Petitioners are unable to establish the retainer against the body of partners. That being so, it appears to me impossible that they should sustain their demand against the whole body of partners.

That would be sufficient probably for the disposal of this case; but, having regard to the decisions in this matter and in others, and having regard to the arguments which have been addressed to us, I think it right for myself to say that I am by no means satisfied that a body of persons such as are engaged in this particular

business, can allege their own illegality as a means of escaping from a winding-up order. I should rather myself be disposed to think that the illegality would be an additional reason for winding them up. I think it right further to add, having regard to what one cannot but conceive to be the real object of these petitions, that, even if there were such a winding-up, it could not, as it appears to me, go beyond dealing with existing assets and providing for existing liabilities, and could not be made the means of enforcing contribution from some members who had not paid in order to reimburse other members who had paid, there being, as it seems to me, no right of contribution whatever either at law or in equity as between the members of such an illegal association as this was.

MELLISH, L.J. :—

I am of the same opinion. I think that the Petitioners in this case have not established their debt. They cannot have established their debt unless they shew that they could have maintained an action at law against all the members of the association who were members of the association at the time when each part of the debt was contracted. Whether, if they could make that out they could go on further and wind up the association, is another question, but at any rate they cannot be entitled to do so, unless they can prove a debt against the whole association. Now, with reference to the first part of their bill respecting the formation of the company, I think the Petitioners must be taken from the outset to have perfectly well known this to be an association or partnership which was to consist of more than twenty persons. They plainly cannot avail themselves of their ignorance of the particular section in the *Companies Act* which makes it illegal to form an association of more than twenty persons. Though they may not have actually known at the very commencement that there would be more than twenty persons they must have known from the explanation given to them of the objects of the association and from the terms of the articles of association which they settled, that in all human probability there would be more than twenty, and almost immediately after more than twenty had signed, they knew

C. A. 1876 *In re* South Wales Atlantic Steamship Co. Judgment, C. A. Mellish, L.J.

as a matter of fact that they had signed. Therefore, I am clearly of opinion that they could not maintain an action at law for any items of that first part of the bill respecting the formation of the company nor respecting any of the other items which were directly connected with carrying on the illegal association, on the ground that they were parties to the illegality, and that the debt being illegal cannot be recovered.

Then, no doubt there are parts of the subsequent bill which were not in themselves illegal, particularly those relating to the actions, because, no doubt, however illegal the association may be, if an action was brought against the persons who were members of the association, they were entitled to defend themselves against that action. Having reference to the action which was brought on account of damage having been done to goods carried on board one of their ships, no doubt the persons against whom that action was brought were entitled to defend themselves against that action. But then the action was not brought against all the members of the association, it was brought only against some of them, and the question arises whether those against whom it was brought, or the committee, or the manager, were entitled to retain these gentlemen to act as solicitors, not on behalf of the Defendants in the action against whom the action was brought, but on behalf of all the members of the association. I am of opinion that they were not so entitled. It is impossible to prove that they were so entitled except by producing this illegal contract for the purpose of shewing the authority. I am quite clear that the solicitors, who must be taken to have been fully aware of the illegality of that contract, cannot rely upon it for the purpose of proving that the members who had given no direct authority to defend that action had authorized the managers to retain these gentlemen to defend it, and that part of the bill they cannot recover. It is perfectly plain that if such an action was successful against the gentlemen against whom it was brought, and they were made personally to pay the damages in that action, they could not get contribution in respect of those damages from the other members of the illegal association, and there being no doubt about that, it seems to me necessarily to follow that they cannot be entitled to make the other members liable with them to the costs of the action. The

costs follow the principal, if there cannot be contribution respecting sums recovered, neither can there be contribution respecting the costs of the action. Then there was another claim brought against one of the captains. One of the captains of one of the ships was summoned for having, contrary, as was alleged, to some Act relating to the *Bristol Pilotage*, omitted to take a pilot. Were the managers entitled on the credit of the whole association to retain a solicitor to defend that claim? There might be some doubt whether, if it was a legal association, they would have such an authority, but, it being illegal, the members of the association, who gave no direct authority, were, in contemplation of law, entirely uninterested in that question. The law assumes that people never intend to go on with an illegal business, it assumes that they mean to stop it at once, and except on the assumption that they were going to continue the illegal business, the members of the association had no interest of any sort or kind in the defence of that claim. Therefore, it appears to me that they were not liable in point of law to have an action brought against them. I do not think our particular attention has been brought to any of the other items, but as far as I have gone through them, they all come within one or other of those two categories, that is to say, either they were perfectly illegal because they were for the purpose of carrying out the illegal objects of the association, or else they were for work done on the retainer of the managers, who had no authority to retain the solicitors to act on behalf of all the members of the association. Therefore I am of opinion that the petitioning creditors' debt is not proved.

With reference to the other question, I confess that I have had very great doubt as to how far there can be an order to wind up an association of this kind. I do not wish to give any opinion which will prevent me from fully considering it whenever the question may come before me for decision. I should be very unwilling to hold, unless I find myself absolutely compelled to do so, that a purely innocent person who employs a partnership of this kind can be prevented from maintaining an action against all the members of it who are practically interested in it, because, without his knowing it, they happen to be more than twenty. Suppose a common ordinary partnership were carrying on this

C. A. 1876

In re South Wales Atlantic Steamship Co.

Judgment, C. A. Mellish, L.J.

business, it seems to me a very extraordinary thing that a creditor should have any obligation put upon him to inquire whether the partners were more than twenty or not. If an action could be maintained, I should have great difficulty in saying that there could not be a winding-up order on the application of a creditor, and I am not clear that in no case could a winding-up order be made on the application of a contributory. I do not wish to encourage any one to make such an experiment in the present case, for I have no doubt that no contributory of this company could get a winding-up order in the state in which things are now, because the company's property has all been parted with, and the business put an end to, so that there is nothing to be done in the way of winding up. I should wish, as far as I am concerned, to keep the question open, whether, when an illegal association is actually going on with its business, if a man, who may have signed in ignorance of the law, or not knowing that there were more than twenty members, finds out that he is engaged in an illegal company with more than twenty, he cannot obtain a winding-up order. He must, somehow or other, be able to stop it, and I have no doubt that such a person could file a bill to restrain all his companions from persisting in carrying on the illegal adventure, and have the property, the ships or whatever it might be which were actually engaged in the illegal adventure, divided among them. For instance, in this case, supposing after one voyage had been made, and before the second voyage was begun, a man wished to stop it who had really a beneficial interest in equity in the ships, he must be entitled, somehow or other, to stop the ships from going on any further illegal adventure, and to have them divided among the persons who owned them. Upon the question, whether that could be done by a winding-up order, or whether it must be done by an action in the Chancery Division, I do not wish to give any conclusive opinion. As far as regards this case, I am of opinion that the appeal ought to be dismissed with costs.

Baggallay, J.A.

BAGGALLAY, J.A. :—

Agreeing, as I do, with the Lords Justices in thinking that no sufficient debt has been established by the Petitioners in this case to entitle them to apply for or support an order for the winding-up

of the company upon the assumption that it was a company that could be legally wound up under the 199th section of the Act, it becomes unnecessary for me to express any decided opinion upon the question, whether a company, illegally constituted, by reason of its want of registration, can be wound up under that section. I only, upon this point, desire to say that I am not, as at present advised, satisfied that any such order could be made. It appears to me that a company of this kind, illegally constituted, and illegally constituted for the express purpose of avoiding the requirements of the Act of Parliament, could not be properly wound up under that statute, though it is possible that under certain circumstances results equivalent to the winding-up might be obtained by means of other proceedings.

Solicitors: *Radcliffe, Cator, & Martineau; R. R. Nelson.*

In re DEIGHTON'S SETTLED ESTATES.

Will—Vesting—Period for ascertaining Class.

A testator directed his trustees to pay the income of his real and residuary personal estate to his wife for life, and on her death to apply the income in the maintenance of his children then living and the issue of his children then deceased (such issue taking the share which their parents would have taken if living) until his youngest surviving child attained twenty-one, and when such child attained twenty-one, to sell the real estate and hold the proceeds and the personal estate in trust for his children then living and the issue then living of his child or children dying before that period. The youngest child attained twenty-one twelve years before the widow's death:—

Held (affirming the decision of the Master of the Rolls), that the class was not to be ascertained before the death of the widow, and that the legal personal representatives of a child who had died without issue in her lifetime took nothing.

Where the effect of postponing the vesting of the shares of children to the period of division would be to leave the family of a child dying before that period without provision, the Court leans strongly in favour of early vesting; but where a testator provides for all his issue living at the period of division, his words will not be strained in order to make the shares vest at an earlier period.

6 Ch D 243 244

Statement.

THIS was an appeal from an order of the Master of the Rolls. *W. S. Deighton* died in October, 1841, leaving a will by which

C. A. 1876 *In re* DEIGHTON'S SETTLED ESTATES. Statement.

he gave his real and residuary personal estate to trustees upon trust to convert so much as did not consist of ready money or of freehold or leasehold estate, and, after payment of debts and a legacy, to invest the residue of the proceeds in consols; and he directed that all the said trust estates and premises should form an aggregate fund, and be held upon trust to pay the income to his wife during her life, if she so long continued his widow, but if she married again, then to pay her £50 a year during the remainder of her life; "and on my said wife's death, or marriage, to apply such income, or the residue thereof, in or towards the maintenance, education, bringing-up, and supporting of such child or children of mine then living, and of the issue of my child or children then deceased (such issue taking the share in such income only as the parent or parents, if living, would have taken) until my youngest surviving child shall have attained the age of twenty-one years. And I direct my trustees, when my youngest surviving child shall have attained the age of twenty-one years, to sell all my said freehold and leasehold estates, and to stand possessed of the money arising therefrom and the residue of the trust premises in trust for my child or children then living, and the issue then living of my child or children dying before that period, such objects to take as tenants in common *per stirpes*, the shares of the children to be paid immediately, the shares of the other issue, being males, at the age of twenty-one years, or, being females, at that age or marriage."

The testator left a wife and nine children. The youngest child attained twenty-one in February, 1862. The widow died in December, 1874. In the meantime several of the children had died, some leaving issue and some without issue.

The opinions of two eminent counsel were taken, one in 1857 and the other in 1870; and they both advised that, without doubt, the class of takers was to be ascertained when the youngest child attained twenty-one, and that their interests then vested. A third counsel, in 1872, further advised that the property had become saleable when the youngest child attained twenty-one. The trustees, after the widow's death, paid away some parts of the residuary personal estate in accordance with these opinions.

The question now arose, who were entitled to the proceeds of

C. A. 1876

In re DEIGHTON'S SETTLED ESTATES.

part of the estate which had been sold during the widow's life under the *Settled Estates Act*, and the purchase-money paid into Court. The Master of the Rolls decided that the class was to be ascertained at the widow's death, thus excluding the personal representatives of children who had died in her lifetime.

J. J. Wilks, who was entitled to the interest, if any, of one of these deceased children, appealed.

Bristowe, Q.C., and *Freeling*, for the Appellant.

Waller, Q.C., and *W. Barber*, and *Fischer*, Q.C., and *Everitt*, for the Respondents, were not called upon.

JAMES, L.J.:—

Judgment, James, L.J.

I think the construction of this will reasonably clear. Putting aside the contingency of the wife's marrying again, which has not happened, the scheme of the will is this: The testator gives his property to his wife for life, and after her death he directs the income to be applied for the maintenance of his children, and the issue of deceased children, until the youngest child attains twenty-one, proceeding on the assumption that his children will not all have attained twenty-one at his wife's death. When the youngest child attains twenty-one he directs the property to be sold. He cannot have intended this sale to take place during the life of his wife. He never meant to take away the income in specie which he had given to her. In saying that the sale is to take place when the youngest child attains twenty-one, he means that the sale is to take place when both events have happened—the death of the wife, and the youngest child's attaining twenty-one. In directing the proceeds to be held in trust for a class of persons "then" living, he means living at the time at which, according to the will, the sale was to take place. The Court leans strongly in favour of the early vesting of interests in cases where the effect of holding the share of a child of the testator to be contingent on his living to a future period would be that, if he died before that period leaving a family, his children would take no benefit under the will; but there is no reason for departing from the fair meaning of the words of a testator in order to vest the

C. A. 1876 — *In re* DEIGHTON'S SETTLED ESTATES.

shares of his children, when he has made a provision for all his descendants living when the fund becomes divisible.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors: *Fielder & Sumner; Heather & Son.*

C. A. 1876 C. J. B. *March* 20. C. A. *April* 27.

Ex parte MARSDEN. *In re* MARSDEN.

Fraudulent Debtor — Prosecution by Trustee in Bankruptcy — Application to Court Ex parte — Order by Registrar acting as Judge — Appeal — Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *ss.* 11, 16, 17 — *Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 71.

When a trustee in bankruptcy applies to the Court, under sect. 16 of the *Debtors Act*, 1869, for an order to prosecute the bankrupt for offences under that Act, the application is properly made *ex parte*, without any notice to the bankrupt, and the bankrupt cannot appeal from the order.

Such an order may be made without any further evidence than the report of the trustee, if the Court is satisfied from that alone that there is a reasonable probability of a conviction.

Ex parte Leonard (1) explained.

Held, by *Bacon*, C.J., that when an order has been made by a Registrar of a County Court acting as Judge, the Judge has no power to rehear the matter or to vary the order which can only be altered by means of an appeal to the Chief Judge.

Statement.

THOMAS MARSDEN, a currier at *Brighouse*, filed a liquidation petition in the *Halifax* County Court on the 18th of January, 1876. The first meeting of the creditors was held on the 4th of February, when a liquidation by arrangement was resolved upon, and *Benjamin Nicholson* was appointed trustee. On the 11th of February, 1876, he made the following report to the Court:—

"I, *Benjamin Nicholson*, trustee of the effects of the debtor, report to this honourable Court that the debtor for some years carried on the business of a currier at *Brighouse*, and that for the last two or three years he has systematically pledged goods with various factors, as admitted by his own statement. I was chairman at the first general meeting of creditors, and examined the debtor as to his affairs, and he then stated in answer to my questions that

(1) Law Rep. 19 Eq. 269.

about two years ago he was solvent, but from that time to the date of the proceedings he had continued to consign his goods to factors for sale, and that in the majority of instances they had been sold at a loss; and, although he was aware of this, he still continued to consign large quantities of goods to such factors, and to obtain advances immediately upon consignment of such goods upon security thereof; and that the said goods were from time to time, with his knowledge and consent, sold at a sacrifice; and at the said meeting the debtor further stated that he purchased about 700 horse hides from Mr. *George Morrell*, of *Leeds*, who is a creditor of the estate for £715, in the month of December last; and that he consigned 320 butts cut by him out of the same hides to Messrs. *J. & T. Powell* immediately afterwards, upon which he obtained an advance of £200, and which were subsequently sold by Messrs. *Powell* at a considerable loss. In this way, according to his own admission, he has lost, on goods pledged with the following persons, the amounts set opposite their respective names."

A list of the names of the persons referred to followed, the total amount of losses stated being £1023 11*s.* 9*d.* The debtor's statement of affairs shewed that his assets amounted to £1951 2*s.* 3*d.*, and that his unsecured debts amounted to £3037 3*s.* 11*d.*

The report proceeded thus:—

"The debtor was aware throughout the whole of these proceedings, extending over two years, that his business was being carried on at a loss, yet he has incurred liabilities to the amount aforesaid, leaving a large deficiency, owing to his pledging the goods at a loss as aforesaid. I am advised and believe that the debtor has therefore committed an offence for which he is liable to be prosecuted under the provisions of the *Debtors Act*, 1869, and in my opinion the said *Thomas Marsden* has been guilty of offences within the meaning of the 13th, 14th, and 15th sub-sections of the 11th section of the Act, and there is a reasonable probability of his being convicted of such offences."

On the same day the trustee applied *ex parte* to the Court for an order to prosecute the debtor, and the Registrar, acting as Judge, made an order (which recited the report of the trustee) that "it appearing to the Court that there is a reasonable probability that

C. A. 1876

Ex parte MARSDEN. *In re* MARSDEN.

Statement.

the debtor may be convicted, the said *B. Nicholson* do prosecute the debtor for the said offences."

The same day the debtor was arrested on a warrant obtained by the trustee, and was lodged in prison, and on the 12th of February he was brought before the magistrates and was remanded, and admitted to bail. On the 15th of February he applied to the County Court to rescind the order of the 11th of February, and in support of his application he made an affidavit in which he denied the charges made against him in the trustee's report, and said that he had never consigned, pledged, or disposed of goods to factors for sale otherwise than in the ordinary way of his trade as a currier, and he stated that the custom of consigning goods to factors for sale and receiving advances thereon was extensively practised in that part of the country both by curriers and many other classes of traders, and was well known and recognised as an ordinary practice of the trade of curriers and many other branches of trade. The application was heard by the Judge on the 22nd of February, and the debtor was then examined in Court. He stated that, till within the last two years, he had carried on his trade at a profit, but that within that period there had been a great rise in the price of raw hides, without a corresponding increase in the price of curried leather, and that the losses which he had sustained were caused by this circumstance. He said that he did not know his position until he took stock in January, 1876. He also said that it was the usual practice of the trade to cut out the butts (or inferior parts of hides) and to send them away for sale at once, as they did not require to be curried.

The Judge was of opinion that the debtor had acted strictly in the ordinary course of business. His Honour thought that the order ought not to have been applied for without giving the debtor an opportunity of defending himself, and of explaining the matter, and his Honour discharged the order with costs. The trustee appealed.

The case came on to be heard before *Bacon*, C.J., on the 20th of March, 1876.

Argument.

Bagley, and *Grain*, for the Appellant:—

The Judge had no power to rehear the matter after an order had been made by the Registrar as Judge; the only remedy was

an appeal to this Court. Sect. 71 of the *Bankruptcy Act*, 1869 (1), does not authorize what is in effect an appeal from one Judge to another in the same Court.

The report of the trustee was sufficient to justify the Court in making the order for a prosecution. Sect. 16 of the *Debtors Act*, 1869, is a substitute for the power which the Court of Bankruptcy formerly had of punishing fraudulent debtors itself. On an application for an order to prosecute, it is only necessary to make out a *primâ facie* case to satisfy the Court that "there is a reasonable probability that the bankrupt may be convicted." The object is to put the criminal law in motion. The bankrupt must afterwards be brought before a magistrate, who will have to proceed upon evidence on oath. The bankrupt will have ample opportunity of defending himself then, and afterwards before a jury. It is not proper that the bankrupt should be examined on, or even that he should have notice of, the trustee's application to the Court of Bankruptcy: *Ex parte Levi* (2); *Ex parte Stallard* (3); *Ex parte Brett* (4).

In *Ex parte Levi*, which was a case under the *Bankruptcy Act*, 1861, the provisions of which were very similar to those of the present Act, Lord *Westbury* said: "It would be a very sad thing if the power of indicting a bankrupt for a misdemeanour, which may demand the immediate interposition of justice, were delayed by giving to the bankrupt the right to demand an investigation; or if, on the other hand, the bankrupt were placed in the painful predicament in which a man about to be brought before a Court of criminal justice necessarily would be placed if he were brought up and put under the necessity of answering questions which might criminate him, or disclose a state of circumstances in which he would lie under great prejudice if he refused to answer."

The debtor's own statements, as appearing in the report of the

(1) Sect. 71 provides: "Every Court having jurisdiction in bankruptcy under this Act may review, rescind, or vary any order made by it in pursuance of this Act. Any person aggrieved by any order of a local bankruptcy Court in respect of a matter of fact or of law made in pursuance of this Act, may appeal to the Chief Judge in Bankruptcy, and it shall be lawful for such Judge to alter, reverse, or confirm such order, as he thinks just."

(2) 34 L. J. (Bkcy.) 23.

(3) Law Rep. 3 Ch. 408.

(4) 1 Ch. D. 151.

C. A. 1876

Ex parte MARSDEN. *In re* MARSDEN.

trustee in this case, are quite sufficient to justify the order for his prosecution. If notice of such an application was to be given to the debtor, the only result would be that a fraudulent debtor would have ample time to abscond.

Argument.

Little, Q.C., and *G. W. Lawrance*, for the debtor:—

Sect. 71 gives ample power to the Judge of a County Court to review his own orders, and the order of the Registrar in this case was in truth the order of the Judge, and could be reviewed by him just as if he had actually made it himself.

The Court ought not to proceed on the report of the trustee alone. Sect. 16 says that the Court is to be satisfied that there is a reasonable probability of a conviction. That shews that the Court must enter into an inquiry, and other evidence besides the report of the trustee is admissible, and ought to be admitted: *Ex parte Leonard* (1).

The debtor ought to have notice of an application of this kind, and to have an opportunity of giving an explanation of his transactions. That was constantly done in cases under the Act of 1861. In *Ex parte Dempsey* (2), a case under the present Act, the debtor was served with notice of an application for his prosecution, and was heard, though the objection was taken that the matter concerned the creditors only.

Further, we contend that, looking at the report of the trustee alone, the transactions complained of were only transactions in the ordinary way of business, and a prosecution ought not to be directed in respect of them: *Ex parte Brett* (3).

Judgment, C. J. B.

BACON, C.J.:—

There are two questions involved. The first is whether the Judge of the County Court had any power to interfere with the order which had been previously made for him and in his name by the Registrar, under the delegated authority which had been conferred on him by the Judge. The terms of sect. 71 are plain. Is it meant that there should be this additional appeal from the Registrar acting as Judge to the Judge himself, besides the ordi-

(1) Law Rep. 19 Eq. 269. (2) Law Rep. 8 Ch. 676.
(3) 1 Ch. D. 151, 153.

nary appeal from the Judge to the Chief Judge? If so, every order made by the Registrar under this delegated power could be made the subject of an appeal to the Judge himself. In my opinion the Legislature has carefully guarded against this result, and I think that the Judge had no power to alter the order made by the Registrar acting as Judge.

But I cannot dispose of the case on this ground only. The meaning of the *Debtors Act* is, I think, perfectly plain. It is for the protection of society at large that this method of punishing defaulting debtors is intended. Under the former law the power of punishing them was exercised by the Commissioners in Bankruptcy. There is no alteration in the law now, except as to the mode in which the power is to be exercised. The trustee is to report to the Court that in his opinion the bankrupt has been guilty of an offence, and then, if it appears to the Court that there is a reasonable probability of a conviction, the Court is to order the trustee to prosecute. It would be most extraordinary if it were necessary that the debtor should be made a party to a proceeding which is in its very nature *ex parte*. The question to be determined is simply whether, in the opinion of the Judge upon the materials before him, there is a sufficient *primâ facie* case to be sent for trial. It is not a question of determining the guilt of the debtor. All that has to be done is to make out to the satisfaction of the Judge that there is a reasonable probability of a conviction, and then the law will take its course. Even then the trustee cannot at once prefer an indictment against the debtor, but he must go before a magistrate, who will hear both parties, and will then either send the case to trial, or will decline to do so, according to the opinion which he forms upon the evidence brought before him. If I were to introduce into the Act a power for the Judge to try the guilt of the debtor, all the other provisions contained in the Act would be unnecessary. To do this might seriously prejudice the debtor, for the Judge could not really try him upon the charge, but an expression of the Judge's opinion as to his guilt might very injuriously affect him when he came to be tried before the proper tribunal. It is an entire fallacy to suppose that the order ought to be made in the presence of the debtor, for after he had been heard the Judge would have no power either to acquit or to convict

C. A. 1876 *Ex parte* MARSDEN. *In re* MARSDEN. Judgment, C. J. B.

him. What, then, is the case presented to the Court here? For the last two years the debtor has carried on a most ruinous business. He has expended a large sum in preparing raw hides for sale, and has systematically sold them for less than they cost him. Whether in so doing he has or has not committed any offence against the law, I do not express the slightest opinion one way or the other; I do not wish to prejudice his case, or to prejudice the case of the trustee. It is only necessary for me to say that I entirely concur in the observations made by Lord *Westbury* in *Ex parte Levi* (1) which have been cited. In *Ex parte Leonard* (2) I appear to have thought that some further evidence was required beyond the report of the trustee. Further evidence might have been necessary in that case, but here I think the report of the trustee is in itself sufficient. *Ex parte Brett* (3) has not the most remote application to the present case. There the charge was that an export merchant had bought goods on credit and had shipped them to *Australia*, and had obtained advances on the bills of lading, and could not account for the money thus obtained. He had done no more than the Messrs. *Baring* and hundreds of other export merchants do every day, though even there one of the Judges said that it was a case of grave suspicion. But it had not the slightest resemblance to the present case. In my opinion the trustee has but discharged his plain duty in making this report to the Court, and the Registrar did only what was right in proceeding to make his order *ex parte*. I do not see how the bankrupt is in any way injured. I am of opinion that the Judge had no power to discharge the order of the Registrar; and, moreover, that he had no right to take into consideration the statements of the debtor, for that would in effect be trying the case, a duty which ought to be performed in the first instance by a magistrate, and afterwards, if necessary, by a jury in the ordinary way. The order of the Judge must be discharged.

C. A. From this decision the debtor appealed, and the case came on to be heard before the Court of Appeal on the 27th of April, 1876. The counsel for the Appellant were desired to confine their atten-

(1) 34 L. J. (Bkcy.) 23. (2) Law Rep. 19 Eq. 269.
(3) 1 Ch. D. 151.

tion to the question whether the Appellant had a right to be heard.

Little, Q.C., and *G. W. Lawrance*, for the Appellant:—

The construction placed upon the *Debtors Act* by the Chief Judge would impose a great hardship upon bankrupts, and is entirely inconsistent with the practice of the Court under the *Bankruptcy Act*, 1861. The bankrupt ought to have an opportunity of avoiding the disgrace and annoyance of having a warrant issued against him by a magistrate; and the magistrate will always be likely to listen to an application for a committal which appears to be made under the authority of the Court of Bankruptcy. The 71st section of the *Bankruptcy Act*, 1869, gives the power of appeal "to any person aggrieved by any order." So that, although it may be true that the bankrupt has no *locus standi* to oppose the original application to the Registrar, he may have a right to appeal against it when made. Under the *Bankruptcy Act*, 1861, the Court allowed in numerous cases an appeal to be brought by the bankrupt: *Ex parte Levi* (1). The clauses in the *Debtors Act*, 1869, are little more than re-enactments of the 222nd and 223rd sections of the Act of 1861, and the same practice ought to be followed now. The bankrupt has in fact been allowed to appeal in more than one case under the present Act: *Ex parte Dempsey* (2); *Ex parte Leonard* (3).

De Gex, Q.C., and *Bagley*, for the trustee, were not called on.

JAMES, L.J.:—

I think that it is very important that a true reading of this section of the Act should be declared, but I cannot bring myself to doubt that the Chief Judge was quite right in saying that it would be very singular indeed if a bankrupt were allowed to appear on an application of this kind. The application ought to be an *ex parte* one, because if it is not *ex parte*, but is tried in the presence of the bankrupt, the bankrupt might feel himself compelled to give an explanation and to submit to an examination, which is quite

(1) 34 L. J. (Bkcy.) 23. (2) Law Rep. 8 Ch. 676.
(3) Law Rep. 19 Eq. 269.

C. A. 1876

Ex parte MARSDEN. *In re* MARSDEN.

Judgment, C. A. James, L.J.

inconsistent with the course of criminal justice in this country. If it is dealt with merely *ex parte*, then it is simply that somebody has made statements and representations to the Court which the Court believes he has reasonable ground for expecting to sustain before the proper tribunal, and the accused person is not prejudiced by them. If it is heard *ex parte* merely upon statements made behind the bankrupt's back, then he comes simply before the magistrate like any other man against whom a charge is made, and the magistrate ought not to be influenced in any way by the fact that an *ex parte* order of this kind has been made. Of course, if evidence is given after he is heard, or he submits to an examination, then it is in truth a preliminary conviction by this Court, which would prejudice him very much; it is equivalent to a decision of the Court that he is guilty. The only effect of the order, as I understand it, as given by the Court, is to throw upon the country the expense of the prosecution, just in the same way as if it were a case of felony, it puts a misdemeanour committed under that Act on the footing of a felony, if the Court thinks it right under the circumstances to expose the country to the expense of such costs. I cannot think it can be good for the creditors or the bankrupt himself, who is supposed to be guilty of any of these offences, that there should be a preliminary trial in his presence before the matter comes before the magistrate.

Mellish, L.J.

MELLISH, L.J.:—

I am of the same opinion. Under the Act of 1861 the Court of Bankruptcy was entitled to act as a magistrate does, and to examine a bankrupt and commit him for trial. Now that is altered by the *Debtors Act*, 1869, and I apprehend that it has been altered, amongst other reasons, because the Legislature thought that a bankrupt was liable to be prejudiced by going up to be tried after a preliminary conviction by the Court of Bankruptcy. Now the Court has to do nothing but to direct a prosecution, and on reading the 16th section there is not a word in it which would in the least degree make one believe that it was intended that the bankrupt should be present. The order is simply, as shewn by the 17th section, that the costs of the prosecution, instead of being

paid in the ordinary way as costs of a misdemeanour, are to be paid by the country, as in cases of felony; and that the bankrupt is not to be prejudiced is further shewn by the 18th section, which enacts "that every misdemeanour under the second Part of this Act shall be deemed to be an offence within and subject to the provisions of the Act of the Session of the 22 & 23 of Her present Majesty, c. 17, intituled '*An Act to prevent vexatious Indictments for certain Misdemeanours,*' and when any person is charged with any such offence before any justice or justices, such justice or justices shall take into consideration any evidence adduced before him or them tending to shew that the Act charged was not committed with a guilty intent." So that there is a positive section saying that the justices are to take that into consideration, and that a bankrupt is to be allowed to go into his defence before them. So it is perfectly plain that it is not intended that the magistrate should commit, as a matter of course, simply because the Court of Bankruptcy has ordered the prosecution. But if it were intended that the application should not be *ex parte*, but that the bankrupt should be heard, then he would be heard first before the County Court Judge, then before the Chief Judge in Bankruptcy, and then before us here, and he would not go before the magistrate until he had been already heard three times. That would be very much to his prejudice.

BAGGALLAY, J.A.:— Baggallay, J.A.

I am of the same opinion. It appears to me that the 16th section of the Act in question was intended for the protection of the bankrupt. If the bankrupt has, in the opinion of the trustee, been guilty of any offence under the Act, or if the Court is satisfied, upon the representation of any creditor or member of the committee of inspection, that there is ground to believe that he has been so guilty, then he may be put on his trial under the Act, but the Legislature has interposed this protection in his favour, namely, that he is not to be put on his trial in respect of any of these offences unless it appears to the Court exercising the jurisdiction, that there is reasonable ground to believe that he may be convicted—that interposes a very important condition in his

C. A. 1876

Ex parte MARSDEN. *In re* MARSDEN.

Judgment, C. A. Baggallay, J.A.

favour; but in my opinion the application for directions to prosecute should be made *ex parte*. If it were not so, it would really operate very prejudicially to him. If the County Court Judge in the first instance directed the prosecution, then, according to the theory put forward, the bankrupt might first appeal to the Chief Judge, and then again to this Court, and on both of these occasions he would have an opportunity of appearing by his own counsel, and, if the decision were against him, he would go eventually to his trial with the fact appearing, that three several Courts, or at least two, including the final Court of Appeal, had given an opinion on the case opposed to him. I therefore entirely concur with the view taken by the Lords Justices, that these applications should be made *ex parte*. I may mention that there are other cases of *ex parte* applications, namely, those made to the Attorney-General under the *Marriage Act*, the *Lunacy Act*, the *Fraudulent Trustees Act*, and a variety of other Acts; and if in cases of this kind the bankrupt has a right to appear, I do not see why a person, whom it is sought to prosecute under these Acts, should not be heard before the Attorney-General gives his approval to a prosecution.

The appeal was accordingly dismissed, but without costs.

Solicitors for Appellant: *Torr & Co.*, agents for *Chambers & Chambers, Brighouse.*

Solicitor for Trustee: *H. Montagu.*

Ex parte ELLIS. *In re* ELLIS.

C. A. 1876 April 27.

Bankruptcy—Adjudication—Appeal—Locus standi of Appellant—Holder of Bill of Sale alleged to be invalid—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 71—*Assignment of all Debtor's Property.*

An adjudication of bankruptcy was made, founded upon the execution by the debtor of a bill of sale which was held to be an act of bankruptcy:—

Held (affirming the decision of *Bacon*, C.J.), that the holder of the bill of sale was entitled to appeal from the adjudication.

Statement of the principles which guide the Court in determining whether an assignment of all a debtor's property is an act of bankruptcy.

Statement.

THIS was an appeal from an order of the Chief Judge in Bankruptcy annulling the bankruptcy of *Robert Ellis*, a farmer in *Cambridgeshire* (1).

The petition for adjudication was presented on the 20th of November, 1875, by *E. E. Ellis*, the father of the bankrupt, a creditor to the amount of £910. The act of bankruptcy alleged was a bill of sale dated the 22nd of July, 1875, whereby the bankrupt assigned all his property, both present and future, to *Francis Thoday*, to secure an antecedent debt of £1840, and a present advance of £105, and also any further advance not exceeding £2200. The Registrar of the *Cambridge* County Court having adjudicated *Ellis* bankrupt, and having afterwards refused to annul the adjudication, *Thoday* appealed to the Chief Judge, who reversed the decision of the Registrar, and annulled the adjudication. The petitioning creditor appealed.

Argument.

Winslow, Q.C., and *Pope*, for the Appellant, renewed the objection taken before the Chief Judge, that *Thoday* had no *locus standi* to appeal against the decision of the Registrar. His right to enforce his bill of sale was not affected by the fact that it had been treated by the Court of Bankruptcy as an act of bankruptcy. If the trustee attempted to set it aside, he would have an opportunity of trying the question. He was not, therefore, "aggrieved" within the meaning of the 71st section of the *Bankruptcy Act*, 1869.

They referred to *Revell* v. *Blake* (2).

(1) *Ex parte Thoday, In re Ellis, Ante*, p. 229. (2) Law Rep. 7 C. P. 300.

C. A.

1876

Ex parte ELLIS.

In re ELLIS.

De Gex, Q.C., and *Cockerell*, for *Thoday*, were not called on.

Judgment, James, L.J.

JAMES, L.J.:—

I think there is no doubt that the Appellant is entitled to appeal. Though he may not be bound by the order of adjudication, still it would so embarrass him that he may properly be said to be aggrieved by it. The validity of the bill of sale is a simple question, which may as well be tried at once.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Argument.

Winslow, Q.C., and *Pope*, then proceeded to argue that the true result of the evidence was that the fresh advances were not made for the purpose of enabling the bankrupt to carry on his business, but only for better securing the antecedent debt due to *Thoday*. From the time of the execution of the deed the whole property had been under the control of *Thoday*. The case was therefore distinguishable from *Ex parte Winder* (1) and *Ex parte King* (2).

[MELLISH, L.J.:—The result of the authorities is, that where a debtor assigns his whole property as a security for a past debt only, it is an act of bankruptcy, whatever the motives of the parties may have been. If there is also a further advance, it is not a question whether the further advance is great or small, but whether there was a *bonâ fide* intention of carrying on the business.]

De Gex, Q.C., and *Cockerell*, for *Thoday*, were not called on.

Judgment, James, L.J.

JAMES, L.J., said that it was clear from the evidence that the transaction was *bonâ fide*. It was the intention of both parties that the bankrupt should go on with his business, and that if he behaved well he should receive further help. The decision of the Chief Judge must be affirmed, and the appeal dismissed with costs.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitor for Appellant: *W. Marshall, Ely.*

Solicitors for Respondent: *Tarrant & Mackrell*, agents for *H. J. Whitehead, Cambridge.*

(1) 1 Ch. D. 290. (2) *Ante*, p. 236.

Ex parte BROWN. *In re* APPLEBY.

C. A. 1876 May 5.

Prosecution of Accomplice of Fraudulent Debtor—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *ss.* 11, 16—*Right to appeal—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 71.

An order was made under the 11th section of the *Debtors Act*, 1869, for the prosecution of a bankrupt, and also for the prosecution of another person as his accomplice:—

Held, that the accomplice was not a person aggrieved within the 71st section of the *Bankruptcy Act*, 1869, and had no right to appeal against the order.

Statement.

HENRY APPLEBY, a chemist in *Tottenham Court Road*, was adjudicated bankrupt on the 18th of December, 1874. He had been engaged in some transactions with *Joseph Brown*, a dyer and money-lender. On the 7th of March, 1876, on the application of the trustee in the bankruptcy, the Registrar, Mr. *Spring Rice*, sitting as Chief Judge, made an order to the following effect:—

"That the trustee be at liberty and he is hereby directed to take criminal proceedings against the above-named bankrupt, and also against *Joseph Brown* for offences against the provisions of the *Debtors Act*, 1869, s. 11, sub-ss. 1, 2, 4, 5, 6, 9, 15, and s. 13, sub-s. 3."

J. Brown appealed from this order.

On the opening of the appeal the counsel for the trustee objected that the Appellant had no right to be heard in opposition to the order.

Argument.

Fry, Q.C., and *Robertson Griffiths*, for the Appellant:—

With respect to this objection to the *locus standi* of the Appellant, we contend that he is a person aggrieved within the 71st section of the *Bankruptcy Act*, 1869, and as such, may appeal although he was not a party to the order: *Ex parte Ellis* (1). It is true that in the recent case of *Ex parte Marsden* (2) the Court refused to hear a bankrupt in opposition to such an order as the present; but in *Ex parte Dempsey* (3) it was held that there were some

(1) *Ante*, p. 797. (2) *Ante*, p. 786.

(3) Law Rep. 8 Ch. 676.

3 H 2 1

Followed Ex parte Evans re Gledhill in re Mellish

C. A. 1876

Ex parte BROWN. *In re* APPLEBY.

Argument.

cases in which a person against whom the criminal proceedings are ordered to be taken may be heard; and surely this is one of such cases, for the Appellant is not to be indicted as a principal, but as an accomplice; and the *Debtors Act*, s. 17, only contemplates an order for the prosecution of the bankrupt, and makes no mention of an accomplice. If it was desired to prosecute the accomplice also, that could be done without an order; and in a proper case the costs would be allowed: *In re Levi* (1). There was therefore no object in this order except to prejudice the Appellant. The order will be produced before the magistrate, and must necessarily prejudice his mind.

Roxburgh, Q.C., *Besley*, and *Grain*, for the trustee, were not called on.

Judgment, James, L.J.

JAMES, L.J.:—

I am clearly of opinion that when any proceedings, civil or criminal, are directed by the Court to be taken by its officer against any person in the course of the administration of a bankrupt's estate, the person against whom the proceedings are to be taken is, of all others, one who ought not to be heard in opposition to the order. He will be heard when the proceedings have been commenced; if they are civil, by demurrer or otherwise; if criminal, when he makes his defence before the magistrate. He has no more right to be heard upon the question whether this preliminary order shall be made, than any other person against whom criminal proceedings may be taken has a right to be present at a consultation between the prosecutor and his solicitor. I am therefore of opinion that the present Appellant has no right to be heard, and that his appeal must be dismissed with costs.

Mellish, L.J.

MELLISH, L.J.:—

I am of the same opinion. The order is by its very nature only a direction by the Court to its own officer, and is properly made *ex parte*, and the person against whom the proceedings are to be taken has no right to be heard against it. We considered

(1) Law Rep. 2 Ch. 493.

and decided the question in *Ex parte Marsden* (1). Under the *Bankruptcy Act*, 1861, the Court exercised a judicial discretion in directing a prosecution, and the person accused was then entitled to be heard in opposition to it, and being so entitled he had a right to appeal, and the consequence was, that the prosecution could not proceed until the Court of Appeal had decided in favour of the prosecution. That was found a very inconvenient course, and one which created a prejudice against the bankrupt, and it was altered by the Act of 1869. Now there is simply an *ex parte* order for prosecution, and the person against whom the order is made is not prejudiced by such an order any more than if the trustee had commenced proceedings of his own accord. The only result of the order is, that the costs of the prosecution are thrown on the country. If the order is wrong, the expenditure is improper, but the person to be prosecuted is not aggrieved by that. It is like the case of proceedings being ordered to be taken by the committee of a lunatic; in that case the person against whom they are to be taken cannot be heard to say that there will be an improper expenditure of the lunatic's estate.

Judgment. Mellish, L.J.

BAGGALLAY, J.A.:—

Baggallay, J.A.

I am of the same opinion. The Appellant is not a person aggrieved within the meaning of the 71st section of the Act of 1869. If he were entitled to be heard, the only effect would be that he would be prejudiced on his trial by the adverse decision of the Court, or perhaps of two or three Courts. I agree that the appeal must be dismissed.

Solicitors for Appellant: *Tilley & Soames.*
Solicitors for Trustee: *Miller & Miller.*

(1) *Ante*, p. 786.

C. A.
1876
C. J. B.
March 20.
C. A.
May 12.

Ex parte MOORE. *In re* STOKOE.

Liquidation by Arrangement—Disclaimer of Lease by Trustee—Notice by Landlord—Extension of Time—Waiver—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 23, 24.

A trustee in liquidation received from the lessors on the 24th of November a notice calling on him to disclaim a lease held by the debtor within twenty-eight days, under the 24th section of the *Bankruptcy Act*, 1869. After some correspondence respecting the property, the lessors wrote a letter to the trustee on the day before the twenty-eight days expired, in which they asked for a reply to their letter of the 24th of November, "at his earliest convenience." The trustee, after the twenty-eight days had expired, applied to the Court for leave to disclaim the lease:—

Held (affirming the decision of *Bacon*, C.J.), that the lessors had waived their right to insist on an answer within twenty-eight days, and leave to disclaim was given.

Statement.

W. S. STOKOE was in partnership with *J. Davison*, since deceased, at *Southwick*, near *Sunderland*, as shipbuilders.

By an indenture of lease dated the 21st of July, 1873, *J. Moore* and *W. H. Moore* demised a piece of land, which they held on a long lease, to *Stokoe & Davison* for fourteen years from the 23rd of November, 1871, at the rent of £50.

On the 21st of September, 1875, *Stokoe*, who had survived his partner, filed a petition for liquidation in the County Court of *Durham*, which was agreed to by his creditors, and Mr. *J. M. Winter* was appointed trustee.

Messrs. *Moore* assigned their interest in the reversion in the piece of land to the *Ayre's Quay Bottle Company*.

On the 24th of November, 1875, Messrs. *Robinson & Longden*, the solicitors for the *Bottle Company*, wrote to the trustee, telling him that their clients could not allow any more goods to be taken from the premises until the rent was guaranteed. The letter then proceeded as follows:—

"They also require to know from you, within the usual time, if you intend to retain the lease, or whether you wish to relinquish it. They further instruct me to give you notice that they have a claim of £64 upon the estate for the value of a blacksmith's

shop or cottage, which the debtors pulled down, and for which they have given an indemnity."

The trustee replied on the following day, in the following terms:—

"25 November, 1875.

"Dear Sirs,—In answer to your favour of the 24th instant, one of the parties called upon me two days ago, and I then undertook to him to pay what rent is legally due. I also arranged to meet him at the Yard and go into the question of the erections. With reference to the lease, I have called a meeting of the committee for Monday next. I will write you shortly afterwards as to our decision. "I am, &c.,

"*J. M. Winter.*"

On the 30th of November, Mr. *H. Dixon* was appointed solicitor in the liquidation, and Mr. *Winter* handed over to him the papers.

On the 10th of December the trustee made an appointment with the agent of the *Bottle Company* to meet him at the Yard on the following day and "arrange terms of settlement."

By some accident the parties did not meet at the time appointed, and the agent of the company requested that a new appointment might be made.

On the 16th of December the solicitor for the trustee wrote to the *Bottle Company*, asking for particulars of their interest in the reversion, and also asking "if they were disposed to treat in any way for immediate possession."

On the 22nd of December the clerk of the company replied, asking for further explanation of what the trustee required, and adding, "Any offer the trustee may make we will be prepared to consider."

On the same day, the 22nd of December, Messrs. *Robinson & Longden*, the solicitors for the *Bottle Company*, wrote to the trustee as follows:—

"We should be glad to have a reply to our letter of the 24th ult., as to whether you intend to retain the lease, at your earliest convenience."

The trustee forwarded this letter to Mr. *Dixon*, who, not finding Messrs. *Robinson & Longden's* letter of the 24th of November

C. A. 1876

Ex parte MOORE. *In re* STOKOE.

among the papers, wrote to them on the 24th of December, asking for a copy of it, which was sent to him the same day.

The twenty-eight days limited by the 24th section of the *Bankruptcy Act*, 1869, expired on the 23rd of December.

On the 6th of January, 1876, the trustee's solicitor called on Messrs. *Robinson & Longden*, and told them that the trustee intended to disclaim the lease.

Statement.

On the 17th of January the trustee applied to the Judge of the County Court at *Sunderland*, under rule 28 of the Bankruptcy Rules, 1870, for leave to disclaim the lease, or that further time might be allowed for the purpose of disclaiming. The Judge having refused the application, the trustee appealed to the Chief Judge in Bankruptcy.

The appeal was heard on the 20th of March, 1876.

Little, Q.C., and *Doria*, appeared for the trustee.

Finlay Knight, for Messrs. *Moore* and the *Bottle Company*.

Judgment, C. J. B.

BACON, C.J.:—

The statute is very plain. The rights conferred upon the lessor are very distinct under the statute. Beyond all doubt the trustee has a right conferred upon him by the statute, and if there was nothing in the case but the statute, I could not hesitate to do as the Lords Justices did in *Ex parte Lovering* (1), and as the County Court Judge has done in this case. The attempt to enlarge the time has nothing to do with the question. The lessors are insisting upon their strict right, but that may be qualified if they have done any thing to put the trustee off his guard. Now, let any one read this letter of the 24th of November and then read the letter of the 22nd of December. In that letter the persons entitled to insist on the twenty-eight days say in effect: "The twenty-eight days are very nearly expired; give us an answer to our letter of the 24th, but do it at your earliest convenience." In my opinion that was calculated to put the trustee off his guard, it was to induce him to believe that these and all other matters which were in difference and controversy between them

(1) Law Rep. 9 Ch. 586.

should wait until there had been further discussion, and until it was convenient for the trustee to disclaim. I do not dispute that the Act of Parliament is binding upon them and upon me, but I say that the right conferred by the statute on the lessor may be waived. In my opinion it has been so far waived that there is no right in the lessors to insist that because the twenty-eight days expired a day or two after they wrote the letter, they are entitled to impose upon the trustee the onerous consequence of making him take the lease upon his own shoulders. Therefore, I think that under the circumstances the order was wrong.

C. A. 1876 *Ex parte* MOORE. *In re* STOKOE. Judgment, C. J. B.

His Lordship accordingly discharged the rule of the Court below and made an order that the Appellant be at liberty to disclaim his interest in the lease of the 21st of July, 1873, and that the Appellant do forthwith in writing disclaim the lease and pay the rent down to the 13th of May, 1876; but made no order as to costs.

From this decision Messrs. *Moore* and the *Bottle Company* appealed.

C. A.

The appeal was heard before the Court of Appeal on the 12th of May, 1876.

De Gex, Q.C., and *Finlay Knight*, for the Appellants:—

Argument.

The 24th section of the *Bankruptcy Act*, 1869, expressly enacts that when a trustee has received an application calling upon him to disclaim, he must do so within twenty-eight days, "or such further time as may be allowed by the Court" And it was decided in *Ex parte Lovering* (1) that this extension of time must be applied for before the expiration of the twenty-eight days. It is true that in that case Lord Justice *Mellish* said: "Having regard to the case of *Banner* v. *Johnston* (2), I do not wish to lay down that the Court has in no case jurisdiction, after the twenty-eight days have elapsed, to enlarge the time;" but he added, "Unless something extraordinary happens, from such a cause as illness or unless the landlord has done something to put the trustee off his guard, I think that the time ought not to be enlarged unless the trustee applies before the expiration of the twenty-eight days." In

(1) Law Rep. 9 Ch. 586, 590. (2) Law Rep. 5 H. L. 157.

C. A. 1876 *Ex parte* MOORE. *In re* STOKOE.

the present case there was no such excuse. The letters that passed between the parties during the interval related to the compensation for pulling down the building and the terms of immediate possession, both which questions were independent of the question of disclaimer.

Winslow, Q.C., and *Doria*, for the trustee, were stopped by the Court.

Judgment, C. A. James, L.J.

JAMES, L.J. :—

I think that the negotiations which were going on between the parties were quite sufficient to justify the Chief Judge in making the order appealed from. The appeal must be dismissed, but there will be no costs of the appeal.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors: *J. W. Hickin*, agent for *Robinson & Longden, Sunderland; H. Dixon, Sunderland.*

C. A. 1876 May 12, 19.

Ex parte CARTER. *In re* CARTER.

Suspension of Bankruptcy—Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *s.* 110 *—After-acquired Property—Notice by Assignee—Withdrawal of Notice—Right of uncertificated Bankrupt to sue out Debtor's Summons.*

15 L.T. 458. 460

A resolution suspending bankruptcy proceedings under the 110th section of the *Bankruptcy Act*, 1861, does not take from the assignee his right to the after-acquired property of the bankrupt; and until the bankrupt has obtained his discharge, the assignee can at any time claim such property.

A bankrupt whose creditors had agreed to a resolution suspending his bankruptcy, but who had never obtained his discharge, recovered judgment in an action against *C.* for £500. The assignee gave notice to *C.* of the bankruptcy, and claimed the money recovered. Afterwards, an arrangement having been come to between the assignee and the bankrupt, the bankrupt, without any interference by the assignee, sued out a debtor's summons against *C.* for the judgment debt:—

Held, that the debtor's summons could not be supported.

Whether the claim having been once made by the assignee could be withdrawn, *quœre.*

Statement.

THIS was an appeal from an order of Mr. Registrar *Keene*, sitting as Chief Judge in Bankruptcy, refusing to dismiss a debtor's

C. A.
1876
Ex parte CARTER.
In re CARTER.
Statement.

summons taken out by *W. Jacobs Thornhill* against Colonel *J. M. Carter*.

W. Jacobs Thornhill was adjudicated bankrupt, under the name of *W. Jacobs*, on the 21st of September, 1869. On the 1st of November his creditors passed a resolution under the 110th section of the *Bankruptcy Act*, 1861 (1), that all further proceedings in bankruptcy should be suspended, and that the estate should be administered by the assignee in bankruptcy, who was Mr. *C. L. Brook*.

The bankrupt never obtained his order of discharge in the bankruptcy.

In June, 1875, the bankrupt brought an action against Colonel *J. M. Carter* for the sum of £500, for commission due to him in respect of the purchase of a freehold estate, and obtained judgment for that sum and costs. Colonel *Carter* moved for a new trial, but his application was refused.

On the 18th of August, 1875, Mr. *H. Montagu*, the solicitor for the assignee in *Thornhill's* bankruptcy, wrote to the solicitor for Colonel *Carter* the following letter:—

"*Thornhill* v. *Carter*.

"On behalf of Mr. *C. L. Brook*, the creditor's assignee of the bankruptcy in 1869 of the Plaintiff *Thornhill*, who was then known by the name of *William Jacobs*, I hereby give you notice, as against yourself and your client, not to part with any moneys recovered from him by the Plaintiff in the action; and I must ask you to

(1) 24 & 25 Vict. c. 134, s. 110: "In case at such meeting, or at any other meeting of creditors, any proposal shall be made by or on behalf of the bankrupt, which it shall appear to the major part in value of the creditors then present ought to be accepted, or if it shall appear to the majority in value of the creditors present at any meeting to be desirable on any ground to resolve, and such majority shall resolve, that no further proceedings be taken in bankruptcy, the meeting shall be adjourned for fourteen days in order that notice of such resolution may be given to every creditor by the official or creditors' assignee, which shall be done accordingly; and if at such adjourned meeting a majority in number representing three-fourths in value of the creditors present shall so resolve, the proceedings in bankruptcy shall be suspended, and the estate and effects of the bankrupt shall be wound up and administered in such manner as such majority shall direct, and the bankrupt, having made a full discovery of his estate, shall be entitled to apply for an order of discharge."

C. A. 1876 *Ex parte* CARTER. *In re* CARTER.

give up such moneys to my client as such assignee as aforesaid, who claims the same, the bankrupt never having obtained his discharge."

Statement.

Subsequently an arrangement was come to between the assignee and *Thornhill* that the amount of the judgment, when recovered, should be divided between them, namely, that £100 should be paid to the assignee and the rest to *Thornhill;* and Mr. *Montagu* accordingly wrote a letter to the solicitor of Colonel *Carter*, dated the 3rd of September, 1875, withdrawing his notice, and stating that he did not object to the payment of the money to the Plaintiff's solicitors.

It was, however, doubtful whether this letter was ever actually delivered to *Carter* or his solicitor.

On the 9th of November, 1875, *Thornhill* sued out a debtor's summons against Colonel *Carter* for the payment of the sum due under the judgment. Colonel *Carter* appeared to the summons, and swore that he was not indebted to *Thornhill* in the amount claimed, and afterwards applied to have the summons dismissed. The Registrar having refused the application, Colonel *Carter* appealed from this decision.

Argument.

Winslow, Q.C., and *Robertson Griffiths*, for the Appellant:—

The future as well as the present property of the bankrupt vested in his assignee, and there was nothing in the resolution for suspending the bankruptcy, or in the 110th section, under which it was passed, to take any of the property out of him. Therefore, until the bankrupt obtained his discharge, he could have no title to any property, except his personal earnings necessary for his support, as against the assignee. In the present case the sum recovered was not for personal earnings. As soon as the assignee gave notice of his right to the money recovered, Colonel *Carter* could not safely pay it to the bankrupt: *Ex parte Taylor* (1); *Ex parte Musgrove* (2). The notice was never unconditionally withdrawn; and even if it had been, the debtor could not safely have ignored the rights of the assignee, for it would have been a breach of trust on his part to give up the money. In order to

(1) 3 De G. & J. 480. (2) 3 M. D. & D. 387.

support a debtor's summons the debt must be such as would support an adjudication of bankruptcy, and an uncertificated baukrupt cannot be a petitioning creditor: *Ex parte Robinson* (1); *Ex parte Mascarenas* (2); *Payne* v. *Dicker* (3).

De Gex, Q.C., and *Bagley*, for *W. J. Thornhill*:—

Independently of the 110th section, we contend that the bankrupt, although he has never obtained his discharge, has power to sustain this debtor's summons. An uncertificated bankrupt may acquire property and make contracts and may sue on them in his own name, although whatever he recovers is recovered for the benefit of the assignee. But if the assignee does not interfere or gives up his right, a debtor of the bankrupt cannot refuse to pay his debt: *Williams* v. *Chambers* (4); *Herbert* v. *Sayer* (5). In the present case the money due to the bankrupt was for personal services. It was a question whether it ought not to belong to the bankrupt like ordinary personal earnings, and it was therefore a fair case for a compromise between the assignee on behalf of the creditors and the bankrupt, and it was no breach of trust on the part of the assignee to give up a portion of it. And as the assignee did not interfere, the bankrupt, having the legal right to recover the judgment, had a good right to take out the debtor's summons.

But we further contend that on the passing of the resolution suspending bankruptcy the assignee's right to the acquired property ceased. The bankruptcy proceedings were at an end, whether the bankrupt applied for his discharge or not. The common practice is not to apply for the order of discharge in such cases, as it is a matter of course if the bankrupt has made a full disclosure. The disclosure required by the 110th section could only relate to the present property of the bankrupt. In *In re Vizard's Trusts* (6) the Court held that after-acquired property did not pass under a creditors' deed registered under the *Bankruptcy Act*, 1861.

Winslow, in reply.

(1) Mont. & Mac. 44.
(2) 1 Dea. & Ch. 507.
(3) Law Rep. 6 Ch. 578.
(4) 10 Q. B. 337.
(5) 5 Ibid. 965.
(6) Law Rep. 1 Ch. 589.

C. A. 1876 *Ex parte* CARTER. *In re* CARTER.

Judgment, James, L.J.

JAMES, L.J.:—

I am of opinion that the appeal must succeed. With respect to the principal ground for appeal, it appears to me utterly impossible to say that the 110th section can have the effect of giving to the majority of creditors the power of depriving the minority of the after-acquired property, without taking the opinion of the Court. The section, no doubt, appears at first sight to be made upon the supposition that only the existing estate is to be wound up as the majority of the creditors should determine; but if it had been intended that the resolution should release all the future property of the bankrupt, the section would have said that the bankrupt should be entitled to his order of discharge, not merely that he should be entitled to apply for it. It is left open for any creditor to shew cause why an order of discharge should not be granted. The 110th section could not in itself have the effect of an order of discharge; it left all the bankrupt's estate vested in the assignee.

Then it stands thus: There was a debt due from the Appellant to the bankrupt; the bankrupt brings an action in his own name, and recovers judgment; and then the assignee intervenes, and says, "I am the person beneficially entitled to the money, whatever legal title the bankrupt may have had to recover it." I am of opinion that the moment the assignee gave notice of the claim to the Appellant the debt vested in him, and no subsequent bargain could enable the bankrupt to sustain a debtor's summons which was taken out at the time when the debt was so vested in the assignee.

Mellish, L.J.

MELLISH, L.J.:—

I am of the same opinion. I think that when the words of the 110th section are looked at, they do not enable the majority of the creditors, by a resolution, to take out of the assignee any property which was vested in him. It was only a resolution that the estate should be administered as the majority of creditors should determine, but it was not intended to take from him the legal estate in any property that was vested in him. Now, by the *Bankruptcy Act*, 1849, all the estate, present and future, of the bankrupt vested in the assignee until something was done to

C. A. 1876 *Ex parte* CARTER. *In re* CARTER. Judgment, Mellish, L.J.

take it out of him. If an action of trover or detinue was to be brought to recover any of the bankrupt's estate, it must have been brought by the assignee, and I do not see anything in the 110th section of the Act of 1861 to affect the estate vested in the assignee, which I think was intended to remain in him till the bankrupt obtained his discharge. That being so, the right to receive this judgment debt is vested in the assignee, and he gave notice to the debtor to pay it to him. Before that notice had been withdrawn (if it could be withdrawn, as to which I give no opinion) a debtor's summons was taken out by a person who, though he may have had a legal right to bring the action for the debt, and probably also to levy execution on the judgment, was not beneficially entitled to the money. The assignee was the creditor of the Appellant, not the bankrupt, and therefore the Appellant is entitled to have the debtor's summons dismissed, with costs.

BAGGALLAY, J.A., concurred.

Solicitors: *J. Bourdillon; H. Montagu.*

PHOSPHATE SEWAGE COMPANY *v.* HARTMONT.

C. A. 1876 *May* 31.

[1873 P. 72.]

Appeal—Security for Costs—Bond—Costs of Application—Rules of Court, 1875, *Order* LVIII., *r.* 15.

When security for the costs of an appeal was ordered to be given, a bond with sureties was allowed, and the costs of the application were ordered to follow the result of the appeal.

Statement.

THE Vice-Chancellor *Malins* had in this case made, on the 29th of May, a decree, against which *E. H. Hartmont*, one of the Defendants, had appealed.

The Plaintiffs now moved that this Defendant should give security for the costs of the appeal.

Argument.

Higgins, Q.C., and *R. Melville*, in support of the motion, cited *Wilson* v. *Smith* (1).

(1) *Ante*, p. 67.

C. A.
1876
PHOSPHATE SEWAGE CO. v. HARTMONT.
Judgment.

Terrell, for the Defendant, opposed, and contended that no case under Order LVIII., rule 15, of the Rules of Court, 1875, had been made.

THEIR LORDSHIPS (*James*, L.J., *Baggallay*, J.A., and *Bramwell*, B.) thought that security ought to be given, and made an order that the Defendant should give security for £200, by either paying the money into Court or giving a bond with two sureties. Proceedings in the appeal to be stayed in the meantime. The costs of this application to follow the result of the appeal.

Solicitors: *J. Holmes; Elmslie, Forsyth, & Sedgwick.*

C. A.
1875
V.-C. B.
Dec. 7, 8, 10, 11, 14, 15, 17, 18, 21.
1876
Jan. 12, 13, 14, 15, 18, 19, 20, 21; *Feb.* 1.
C. A.
May 8, 9, 10, 11, 15, 16.

PATTERSON *v.* GASLIGHT AND COKE COMPANY.

[1873 P. 62.]

Patent—Infringement—Subject of Patent—Prior User—Anticipation—Disqualification of Plaintiff from being a Patentee.

Under an Act of Parliament three referees were appointed by the Board of Trade to inspect the gasworks of the metropolis, to report upon the impurities in the gas, and to fix a maximum of impurities to be allowed; and the gas companies were bound to give them every facility in the discharge of their duties.

One of the referees took out a patent for improvements in the purification of gas, claiming (*inter alia*) a method of employing lime purifiers, whereby the contents of the purifiers might be converted into sulphide of calcium, for the purpose of purifying the gas from certain compounds of sulphur with which sulphide of calcium combines.

Before the patent was taken out, the Defendant company had been in the habit of using lime purifiers, by which sulphide of calcium had been produced, but they had not succeeded in attaining the desired purity on account of their failing to extract from the gas the whole of the carbonic acid contained in it, which impeded the operation of the sulphide of calcium in the purifiers. The Plaintiff's invention mainly consisted in keeping a fresher supply of lime in the first series of purifiers, so as completely to eliminate the carbonic acid from the gas before it was passed on to the subsequent purifiers, in which the sulphide of calcium was produced. The principle of this improvement was indicated in the last report of the referees, but the report was not published till after the date of the patent:—

Held (reversing the decision of *Bacon*, V.C.), that the Plaintiff's invention only amounted to an instruction for the more efficient working of a

known process, and was not a proper subject for a patent, and the Plaintiff's bill was dismissed.

Whether it is competent for a member of an official commission to take out a patent for the results of his official investigation, *quære*.

C. A. 1876

PATTERSON v. GASLIGHT AND COKE CO.

Statement.

Affirmed by H. of L. 3 Ch. Cas. 259

THIS was a suit instituted by *Robert Hogarth Patterson* against the *Gaslight and Coke Company*, commonly called the *Chartered Gas Company*, and *J. O. Phillips*, their secretary, for the purpose of restraining them from infringing the Plaintiff's patent for the purification of gas.

The Defendant gas company have extensive works at *Beckton*, *Bow Common*, *Blackfriars*, and elsewhere.

Coal gas before purification contains various impurities, particularly tar, water, ammonia, carbonic acid, and also sulphuretted hydrogen, and other compounds of sulphur. Not much difficulty has been experienced in removing the tar, water, ammonia, and sulphuretted hydrogen, but it has been found more difficult to remove the other compounds of sulphur. The Defendants had paid great attention to the subject, and had made extensive experiments, particularly at *Beckton* and *Bow Common*, but were unable to keep down the sulphur impurities within the requirements of the Board of Trade.

The crude gas was first passed through vessels, called washers and scrubbers, to remove the tar, water, and ammonia, and (previously to 1850) was then passed into purifiers containing lime to remove the sulphuretted hydrogen. The sulphuretted hydrogen combining with the lime in the purifiers produced sulphide of calcium, which is the only known agent for absorbing the other forms of sulphur remaining in the gas. The purifiers were worked in sets of four, three being at work, and the fourth being charged with lime and ready to be brought into action when required. The first in the series was thrown out of action when the last or last but one shewed at the outlet any trace of sulphuretted hydrogen; the fourth purifier, charged with fresh lime, was then put on last in the series.

In 1850 oxide of iron began to be used instead of lime for the purpose of removing the sulphuretted hydrogen. Oxide of iron has no effect on the other compounds of sulphur; and soon after the introduction of oxide of iron as a purifying agent, complaints

C. A. 1876

PATTERSON v. GASLIGHT AND COKE CO.

Statement.

began to be made that a large portion of these compounds was to be found in the gas consumed in the city of *London*.

The Defendants, in order to remove these compounds, made use of lime in addition to oxide of iron.

The Plaintiff claimed to have discovered that none of these processes employed by the Defendants entirely removed the carbonic acid from the gas, and that that acid combined with the sulphide of calcium in the purifiers, turning it into carbonate of lime, and thus preventing it from acting properly on the sulphur compounds. The Plaintiff alleged that no means were known before the publication of his patent for overcoming this difficulty.

The Plaintiff was one of the three gas referees appointed by the Board of Trade under the *City of London Gas Act*, 1868, 31 & 32 Vict. c. cxxv., whose duties are thus defined:—

By sect. 34 it is enacted that the referees shall, with all practicable speed after their appointment, and from time to time thereafter, inspect the works of the companies, and investigate the processes of manufacture carried on therein, with the view of ascertaining the means adopted therein for purifying gas and for preventing nuisance, and may from time to time apply all such tests as they think expedient at the works of the companies or elsewhere for ascertaining the amount of sulphur and of ammonia and of compounds thereof, or other impurity, with which gas supplied by the companies is charged. By sect. 35 the companies are to give to the referees access to their works, and to afford them all facilities in the execution of their duty. By sect. 36 the referees are from time to time to ascertain with what degree of purity each company can reasonably be required to make and supply gas continuously without occasioning a nuisance to the neighbourhood in which the works are situate, and are thereupon to prescribe and certify the maximum amount of impurity in each form with which gas supplied by the company shall be allowed to be charged, and the time from which the allowance thereof shall be enforced as against each company, regard being had to the necessity for any alteration of works by a company consequent on such certificate.

On the 31st of January, 1872, the referees signed a report,

entitled "Report on Sulphur Purification at the *Beckton Gasworks*, by the Gas Referees."

This report stated fully the process used at those works and the results; and also discussed the whole subject of gas purification. Under the head of "Remedies" the referees said (*inter alia*): "The prime object to be sought is to utilize and perfect the existing processes of purification; for if these can be made to yield satisfactory results, the interests of the public require that this should be accomplished in preference to the introduction of other processes which would increase the cost of gas manufacture.

"The referees feel confident that such a result is attainable. From experiments which they have made they can state that lime in the form of sulphide of calcium (*i.e.* saturated with sulphuretted hydrogen) is a perfectly adequate purifying agent for sulphur. In their laboratory experiments they are able in this way to wholly remove the sulphur (about 26 grains per 100 feet) from the gas supplied to their office. So great a result cannot, of course, be expected in gasworks. . . . Nevertheless, making due allowance for the difference between laboratory experiments and purification on a manufacturing scale, the referees feel assured that useful results would be obtained from the lime process of purification, if carbonic acid were excluded from the purifiers; and also that the result will be adequate to the requirements of the public, if the carbonic acid which enters the purifiers be kept down to the lowest point actually attainable in gasworks. The problem to be solved is how to take out all the carbonic acid from the gas without simultaneously taking out all the sulphuretted hydrogen, which latter element is needed to convert the contents of the purifiers into sulphide of calcium. And the essence of the difficulty consists in the fact that carbonic acid exists in the gas n very much larger proportion than sulphuretted hydrogen; while there is no chemical substance which absorbs carbonic acid, without also absorbing sulphuretted hydrogen."

The referees then suggest improvements in the structure of the scrubbers, and with respect to the purifiers they say, "By far the most important point, where (as at *Beckton*) lime purifiers are used, is to reduce as much as possible the amount of carbonic acid in the gas in the anterior process of purification. . . It appears impracc-

C. A. 1876 PATTERSON v. GASLIGHT AND COKE CO. Statement.

ticable at present to entirely exclude carbonic acid from the processes; but the referees are of opinion that the detrimental action of this element might be lessened by adopting a new system in working the purifiers, namely, by keeping (say) the two first lime purifiers in each house in action, not merely until they become "foul," but until the carbonic acid has expelled the sulphuretted hydrogen and taken its place. By this method the largest possible amount of carbonic acid will be absorbed from the gas by the first purifiers of the series; while the sulphuretted hydrogen is driven forward, converting the contents of the subsequent purifiers into sulphide of calcium."

This report was not received at the Board of Trade till the 27th of March, 1872, and was soon afterwards communicated to the Defendants.

In the meantime the Plaintiff, on the 9th of March, 1872, applied for a patent, which was dated the 9th of March, 1872, for "Improvements in the Purification of Coal Gas."

With respect to the purification of the gas from carbonic acid gas, the Plaintiff, after referring to the chemical fact that lime had a greater affinity for carbonic acid than for sulphuretted hydrogen, stated his method of applying that principle to the purification of gas as follows:—"One process of applying the above described principle is by passing the gas through the first lime purifier or purifiers of the series for such time that the carbonic acid from its greater affinity for lime shall have expelled sulphuretted hydrogen from the said purifier or purifiers, taking its place and driving it (namely, the sulphuretted hydrogen) forward into the succeeding purifiers. By this means the carbonic acid can be wholly eliminated from the gas by the first purifier or purifiers, while sulphuretted hydrogen being driven forward converts the contents of the succeeding purifier or purifiers into sulphide of calcium, which is a highly efficient material for purifying the gas from sulphur in other forms than sulphuretted hydrogen. Thereupon these latter mentioned purifiers, now containing sulphides of calcium, may be used first in the series and the gas passed through them into subsequent purifiers containing fresh lime, whereby the contents of these subsequent purifiers, or of any one of them, can be converted in turn into sulphides of calcium. Or the first purifier or purifiers

of the series may be constantly employed chiefly for the purpose of eliminating the carbonic acid from the gas, while sulphur in all forms is eliminated from the gas in the succeeding purifiers."

The Plaintiff claimed as his invention:—

"First: The employment of sulphides of calcium in separate purifiers, as a means of purifying coal gas from sulphur existing in other forms than in that of sulphuretted hydrogen.

"Secondly: A method or system of employing lime purifiers in the manner hereinbefore described, whereby the contents of all the said purifiers, or of any required number of them, can be converted into sulphides of calcium, and also (if required) be maintained in that condition.

"Thirdly: The employment of a solution of caustic soda, or of potash, or of ammonia, used in washers or scrubbers in the manner hereinbefore described, in order to eliminate carbonic acid from coal gas, and in such a manner as to convert the lime in purifiers, or the soda solution contained in any required number of the said washers or scrubbers, into sulphides of calcium and sulphides of sodium respectively, and also, if required, to maintain them in that condition.

"Fourthly: The employment of the soda washers or scrubbers, after the gas has been purified from carbonic acid and sulphuretted hydrogen, as a means of purifying the gas from sulphur existing in other forms than that of sulphuretted hydrogen.

"Fifthly, the employment of sulphur in a fine state of division, in conjunction with an inert substance suitable to form a porous substance through which the gas may pass freely, or in combination with lime or with soda (or with lime and soda together), in solution or otherwise, in order to effect the purification of coal gas from sulphur existing therein in other forms than that of sulphuretted hydrogen."

The Plaintiff accused the Defendants of having adopted all or some of his patented improvements, and eventually filed the present bill to restrain them from infringing his patent.

The Defendants contended that the claims made by the Plaintiff were too general; that as to the first, third, fourth, and fifth claims, there was no novelty; and as to the third, fourth, and fifth, that the

C. A. 1876 PATTERSON v. GASLIGHT AND COKE CO.

Statement.

alleged inventions were of no practical value; that the alleged inventions, or some of them, had been anticipated by a patent taken out by *W. Mann* in December, 1871; and that the alleged improvement mentioned in the second claim was not the proper subject for a patent, being neither the discovery of a new principle nor the invention of a new process, but only a practical direction for working a well-known process. The Defendants also insisted that the Plaintiff had derived his knowledge of the method which he pretended to have invented from the opportunities afforded him, in his official position, of seeing the processes employed by the Defendant company, and from information supplied to him by them; and they submitted that it was not competent for the Plaintiff to make use of the knowledge acquired by him as a public officer in the discharge of his duties, for the purpose of taking out a patent.

Both parties went into evidence as to the novelty and utility of the Plaintiff's improvements, and as to their anticipation by the Defendants in their own works; the result of which evidence is stated in the judgment of the Court of Appeal.

It appeared that the Defendants had consulted Dr. *Odling* and Dr. *Letheby*, and obtained from them reports, of which Dr. *Odling's* recommended a process similar to that described in the Plaintiff's patent. Dr. *Odling's* report was dated the 28th of March, 1872, subsequent to the Plaintiff's patent.

The case came on to be heard before Vice-Chancellor *Bacon* on the 7th of December, 1875, and the Plaintiff and several witnesses were examined in Court.

Kay, Q.C., *Fry*, Q.C., *Aston*, Q.C., and *Tremlett*, appeared for the Plaintiff.

Southgate, Q.C.; Sir *H. James*, Q.C., *Davey*, Q.C., and *Stirling*, (*Hawkins*, Q.C., with them), for the Defendants.

Judgment, V.-C. B.

BACON, V.C., after stating the nature and object of the Plaintiff's patent, and the various methods employed by the Defendants in their works to remove the sulphur impurities in the gas, and the suggestions made by Dr. *Letheby* and Dr. *Odling* for improvements in the process, continued:—

In Dr. *Odling's* suggestion the first and most essential principle

recommended is the "completely decarbonating the gas by means of lime frequently renewed, and then transmitting the completely decarbonated gas through other lime, but very seldom renewed."

It has been admitted, and is, in my opinion, clearly established by the evidence, that the principle of Dr. *Odling's* recommendation is identical with that of the invention claimed by the Plaintiff and expressed in his specification. But the manner of applying that principle is nowhere mentioned by Dr. *Odling*. He had examined, and was well acquainted with, the apparatus and mode of working employed by the Defendants. It did not, perhaps, fall within his province to suggest any improvement in the mechanical contrivances by which the primary and essential condition which he prescribed, viz., the decarbonating the gas before its purification, should be fulfilled. At all events, he did not so suggest, but he says: "Of course if it could be contrived in any way to make the decarbonated gas remain in contact with the sulphide of calcium for a longer period, a better result might be anticipated."

And this very contrivance is described in the Plaintiff's specification. By that contrivance the decarbonated gas remains in contact with the sulphide of calcium for a longer period, and that thereby a better result has been attained is not a matter in dispute. For, upon the pleadings, it is apparent, and it has been frequently admitted by the Defendants' counsel in the course of the argument, that the process which is now employed and practised by the Defendants in their manufacture of gas at *Beckton* is identical with that which is claimed by the Plaintiff to be his invention. The Defendants deny, however, the novelty of the alleged invention, and they dispute the validity of the patent upon several grounds —each of which they say is enough, if established, to invalidate the patent. Each objection has been argued at great length, and with consummate ability, and each of them is entitled to separate and serious consideration.

Not the least important of them is the objection raised to the specification, which has been subjected, as it is right that it should be, to a most minute and searching criticism. It is undoubtedly the law, and it is also perfectly just and reasonable, that a man who has obtained a patent should be under the obligation of stating in clear and intelligible terms the nature of the invention he claims,

C. A. 1876 PATTERSON v. GASLIGHT AND COKE CO. Judgment, V.-C. B.

and the means by which that invention is to be applied in practice. The construction of a specification, like the construction of all written instruments, is in all cases for the Court in which the question arises, and must be dealt with strictly, it is true, but also with a fair regard to the subject, and to the terms which are employed. Now the meaning of the Plaintiff, whatever terms he may have employed, I take to be this: He says to all the world, but he must be taken at the same time to address especially the persons engaged in and acquainted with the manufacture of gas, "I have found out a better method of purifying gas than has been hitherto known and practised. The existence of impurities is notorious. The names by which they are called are known. The existing process of manufacture is well known, and the failures to remove the impurities are known and acknowledged by you. I am the first person who has found out that there is a principle by which that object for which you have been striving for years, and in vain, can be attained; and I have discovered, and will tell you, by what process that principle can be applied." Those words are not in the specification, but having regard to the subject to which they are applied, their meaning must, in all fairness, be ascribed to it. He does say in very words, "I have been the first to see the importance of and to have practically carried into effect the principle of excluding carbonic acid from lime purifiers, or from any required number of these, as a means of obtaining steady and perfect results in the purification of gas from sulphur." This being the object of the invention, he says it relates to the purification of coal gas from sulphur by means of sulphides of calcium (distinct from foul lime) employed in separate purifiers. That is the principle. He further says it relates to a principle and process of working lime purifiers (things which are used in all gas manufactories), whereby the carbonic acid in the gas is eliminated by the action of the first purifier or purifiers in the series, in such manner that the lime in the subsequent purifiers is converted, either wholly or to any extent that may be desired, into sulphide of calcium. In subsequent parts of the specification he explains the manner in which he proposes to employ the processes. He points out the most economical manner of making the sulphide of calcium, and describes in detail what he calls the new principle and process of

employing lime purifiers. He describes one process by which several purifiers may be employed in succession or rotation. "Or," he says, "the first purifier may be constantly employed." In the "claim" which concludes the specification, he says: "What I consider to be novel and original, and therefore claim, is, first, the employment of sulphides of calcium in separate purifiers as a means of purifying gas from sulphur in other forms than sulphuretted hydrogen; secondly, a method of employing lime purifiers in the manner hereinbefore described, whereby the contents of all the said purifiers, or of any required number of them, can be converted into sulphides of calcium, and also, if required, be maintained in that condition."

Now, upon this it has been argued for the Defendants that under the first head he claims as a novelty the use of sulphide of calcium, whereas that substance and its purifying effects upon gas have been long known to chemists and to gas manufacturers, and that the process first described being bad, upon that ground the alternative process suggested by the Plaintiff must be bad also, the law being, as it is truly said, that a patent granted for a claim which is bad in part must be held to be bad in the whole. But I do not think that the Plaintiff has in any part of his specification claimed the use of sulphide of calcium as his invention, or that the reference to "the manner hereinbefore described" vitiates or affects the claim in which those words occur.

The objection of the Defendants that the invention claimed by the Plaintiff cannot be the subject of a patent does not appear to me to be well founded, for he does not claim the discovery of a principle only (which would not be sufficient), but of a principle combined with a process, easily applicable by any persons acquainted with the manufacture of gas, by which the principle may be exercised for the purpose of producing the result indicated. The other objections to the specification appear to me to be groundless, for I hold that the construction of the instrument is reasonably clear—that there is no uncertainty or ambiguity in its expressions—that it does not raise any inconsistent claims—and that it is not open to the objection that, being bad in some part, it must be held to be bad altogether.

But then the Defendants insist that there is no novelty in the

C. A. 1876

PATTERSON v. GASLIGHT AND COKE CO.

Judgment, V.-C. B.

invention claimed, and to this point a very large proportion of the evidence adduced by the Defendants has been directed. They have called the three principal officers employed at the Defendants' works at *Beckton* and at *Bow*, two very eminent professors of chemistry, and five other persons acquainted with the chemical properties of gas—with the manner in which it is manufactured—and the means by which impurities are removed from it. They all assert that there is no novelty in the Plaintiff's invention, for that by the use of lime, by the production of sulphide of calcium, and by its effect on the sulphur impurities, they may be, and have, in fact, been removed. All of which is perfectly true, and if the Plaintiff had denied this and had founded his claim upon such denial, the evidence I have alluded to might have been conclusive against the patent. But not only does the Plaintiff not deny these facts, but his invention assumes and adopts them, and it is not satisfactory (although the practice is by no means new) to impute to the adversary something which he has neither said nor meant, and then to proceed by demolishing it to obtain an easy and certain victory. What the Plaintiff says is, "Granting that all you say, you have known and done, you don't say that you knew the first essential process in removing sulphur compounds from gas was to eliminate carbonic acid by sulphide of calcium (not by 'foul lime'), and by means of separate purifiers." And no one of these witnesses says he did. And until Dr. *Odling* pointed it out as a discovery of his (which probably it was although made after the date of the patent), there is no trace that I can find in all the verbose and voluminous evidence which has been furnished by the Defendants, that either the principle or the process described in the specification had been used or was known in the manner and for the purpose described in the specification. And I am compelled to observe on this part of the case that if what these witnesses say were adopted, it is impossible to account for the excessive amount of impurity which the tables I have referred to shew to have existed in the gas before the date of the patent, or for the frequent confessions by the Defendants' agents that they did not know how to reduce that impurity, although they were earnestly endeavouring by experiments and otherwise; and although they had called in the advice of Dr. *Letheby* and Dr. *Odling* to assist them in

effecting that most desirable object, Dr. *Letheby's* suggestions are wholly different from the Plaintiff's invention. Dr. *Odling's* are identical with them; but until his letter of the 28th of March was communicated to the Defendants, there is no ground that I can find on which it can be said that the principle and process then patented by the Plaintiff were not novel. That they have proved to be useful is established by the fact that the Defendants have adopted and used and are now employing it.

Another ground upon which the novelty of the patent was impeached was that a patent which had been taken out by *Wm. Mann* had anticipated the Plaintiff's alleged invention. The provisional specification by *Mann* was filed on the 2nd of December, 1871. [His Lordship then considered the terms of that patent, and continued:—]

It would, however, be enough to say that the specification of *Mann*, anterior as it is to that of the Plaintiff, cannot invalidate the Plaintiff's patent, inasmuch as it does not disclose a practical mode of producing the effect which the Plaintiff describes: *Betts* v. *Menzies* (1). But besides this, it must be added that *Mann's* patent never has been brought into actual operation, but has been suffered to drop, and is no longer in existence.

The Defendants insist, moreover, that the invention claimed by the Plaintiff had been used by them before the date of the patent; and to this end a considerable portion of their evidence and the arguments founded upon it have been addressed. [His Lordship then referred to the experiments which had been made by Mr. *Trewby*, the manager of the Defendants' works at *Beckton*, to eliminate the carbonic acid, and remarked that the experiments, whatever they were, had been unsuccessful. He then continued as follows:—]

It may be that Mr. *Trewby* knew that the presence of carbonic acid was an obstacle—it may be that he was—indeed, it is clear that he was—making experiments to overcome it, and that he had partially succeeded; but even if it were assumed (which, as matter of fact, I cannot do) that he had conceived the same idea as the Plaintiff, that would amount at the most to this, that of two men travelling on the same road, in search of the same

(1) 10 H. L. C. 117.

C. A. 1876 PATTERSON v. GASLIGHT AND COKE CO. Judgment, V.-C. B.

object, the one who first attains it, who describes it in intelligible and accurate expressions, and who obtains a patent for the protection of what he has thus acquired, cannot be deprived of it because another would fain have reached the goal before him, but did not.

Then it has been said that the Plaintiff's invention had been published by means of a letter which he wrote to Mr. *Trewby* before the date of his patent. The purport of the letter is to request Mr. *Trewby* to try certain experiments respecting carbonic acid. It was written at a time when the Plaintiff says he had collected the materials for the specification which he shortly afterwards filed, and because he wished to have the experiment he suggested tried upon the large scale which the *Beckton Works* afforded. Without ascribing to this letter the character of a confidential communication, I think it was no publication, and Mr. *Trewby*, who did not return any answer to this letter, thought, and thinks so too; for he denies "emphatically" that he received from the Plaintiff any information which guided him in the experiments which he made or in the discoveries he arrived at.

It has been suggested in the course of the argument that the patent is invalid with respect to the third, fourth, and fifth heads of the invention. But I think these objections cannot be said to have been fairly or sufficiently put in issue by the Defendants, or that any evidence has been adduced upon which they can be sustained. All that the Defendants say upon the subject in their answer is, that "they have never tried the processes purporting to be described in those three heads, and have no intention of doing so, but they believe there is no novelty in any of them; and that such processes are of no practical value whatever for the purification of gas from sulphur, or for any other purpose." In Mr. *Evans's* affidavit he says, "such processes were all well known to gas engineers who have used them in the purification of gas, but such processes have long since been abandoned by them." The statute 15 & 16 Vict. c. 83, s. 41, provides that in actions at law no evidence shall be admitted unless the objection shall have been distinctly raised, and the principle of that enactment has been recognised and acted upon in suits in equity: *Finnegan* v. *James* (1). The Plaintiff having stated in his specification that

(1) Law Rep. 19 Eq. 72.

he proposed to attain the same object (viz. the purification of gas from sulphur compounds) "by means of sulphur in a fine state of division used along with sawdust, or such like substance," says in his fifth head of claim that he claims "the employment of sulphur in a fine state of division with an inert substance." Upon this it has been argued that when oxide of iron had been employed to take out sulphuretted hydrogen, some portion of sulphur must in that process have been deposited on the iron, and that upon its being revivified, the sulphur so deposited will form sulphur "in a fair state of division with an inert substance." I cannot, however, think that in any just mode of construing the specification, oxide of iron, which is a most active and efficient agent in taking out sulphuretted hydrogen from the whole volume of the gas to which it is exposed, can be said to mean one of those "inert substances like sawdust," which the Plaintiff proposes to employ with sulphur in a fine state of division.

The only other objection to the Plaintiff's suit is directed against him personally. The answer alleges that the Plaintiff, "previously to his appointment as a gas referee, had no acquaintance with the modes and processes of manufacturing gas." That the Defendants believe that the Plaintiff derived his knowledge of the methods which he pretends to have invented from opportunities afforded to him in his official position of seeing the processes employed by the company, and from information directly supplied to him by persons employed by the company. And the Defendants submit to the Court whether it is competent for the Plaintiff to make use of the knowledge acquired by him as a public officer in the discharge of his duties for the purpose of taking out a patent. This objection has been earnestly enforced in argument. I cannot, however, say that I think the Plaintiff was disqualified, by reason of his employment, from availing himself of any discovery he may have made. His duties as a public officer are very clearly prescribed by the statute under which he was appointed. He appears to have discharged those duties in co-operation with the other referees efficiently, certainly without any censure or complaint that I have heard of. No doubt he could not have made the discovery he claims, unless he had obtained extensive and accurate knowledge of the manufacture and purifi-

C. A. 1876

PATTERSON v. GASLIGHT AND COKE CO.

Judgment, V.-C. B.

cation of gas. How much of that knowledge was derived from the information afforded to him by the company's officers, and how much of it was the result of his own inspection and observation, need not be inquired into, and cannot be ascertained. But whatever was the extent of such information, it does not seem to have been more than his powers under the statute would reasonably entitle him to require, nor to have led to the discovery in any other manner than that the knowledge of known laws and principles must exist before the faculty of invention can have an object to which it may be applied.

I have not thought it necessary to go into the report of the referees, made on the 21st of March, 1872, to the Board of Trade, because I do not think that it affects the real question between the parties, and because I am unwilling to extend further the observations I have felt it right to make.

Many authorities have been referred to on both sides; but as the law upon this subject is perfectly familiar and open to no doubt, it is needless to mention them. If the objections taken by the Defendants were well founded, it is clear that the patent could not be sustained. On the other hand, those objections failing, the Plaintiff's rights and his title to relief are established by numerous decisions.

I believe that I have now gone through at least the principal and the only important topics which have been discussed. I have attended to that discussion during the several days which it occupied, and I have since looked through the evidence and considered the arguments addressed to me. The task has been somewhat laborious, but having performed it as well as I am able, I come to the conclusion that the Plaintiff is the inventor of a principle and process, by which the purification of gas from what are called the sulphur compounds may be effected to a greater extent than had ever been practised before the date of the letters patent; that the Defendants, who admit that they have adopted and now practise that invention, have been and are able to keep down the amount of impurities in the gas to an extent and degree very far superior to those which existed before the Plaintiff's patent rights were created, and to exercise a much greater control over those impurities than they had been able to exercise previously. The Defen-

dants having then practised the Plaintiff's invention without his consent, I think he is entitled to the injunction prayed for by his bill, and is also entitled to be paid by the Defendants such damage as he has sustained by their unlawful use of that which was his exclusive property. And for this purpose an inquiry must be directed to ascertain the amount of such damage.

C. A. 1876 PATTERSON v. GASLIGHT AND COKE CO.

The VICE-CHANCELLOR also gave the Plaintiff his costs of the suit; and, upon an application on behalf of the Defendants, permitted the injunction to be suspended for three months, the Defendants undertaking to abide by any order the Court might make as to damages payable by them in consequence of such suspension.

From this decision the Defendants appealed.

C. A.

The appeal came on to be heard on the 8th of May, 1876.

Southgate, Q.C., Sir *H. James*, Q.C., *Davey*, Q.C., and *Stirling*, for the Defendants.

Argument.

After stating the case, and referring to *Ralston* v. *Smith* (1), and reading the evidence, they were stopped by the Court.

Kay, Q.C., *Fry*, Q.C., *Aston*, Q.C., and *Tremlett*, for the Plaintiff:—

First, with regard to the personal objection made to the Plaintiff, as being incapacitated by his official position from taking out this patent. The objection, if valid, may be a ground for recalling the letters patent, but so long as they remain unchallenged they must be treated as valid, and enforced by this Court. But we contend that the objection is untenable, for there is no reason or authority for preventing any man from making use of knowledge acquired in the course of a paid employment, to produce an invention, unless he is bound by some contract with his employer not to do so. Indeed, the men who make improvements are generally those who become conversant with the particular subject in the course of their ordinary employment, as in the case of Captain *Boxer's* improvements in cartridges. The Plaintiff was bound by

(1) 11 H. L. C. 223.

C. A. 1876

PATTERSON v. GASLIGHT AND COKE CO.

Argument.

no contract or duty towards the Defendants to give them the benefit of his discoveries. It was not the duty of the gas referees to advise the Defendants how to purify their gas, or to investigate their processes, but only to see the results of the processes, and to fix the maximum of impurity allowable. The Plaintiff could not oblige the Defendants to try any particular process which he might think better than theirs; and if he knew of a better method than they did, he was quite as free to take out a patent for it as a stranger. If any one had a right to claim the benefit of the Plaintiff's invention, it was the Board of Trade, whose servant he was. He was not employed by the gas companies; on the contrary, he was intended to be a check upon them, and to see that they conformed to the regulations imposed upon them.

With respect to the charge of want of novelty which is brought against all the improvements except that contained in the second claim, we say that the burden is not on us to prove novelty. It is for those who deny novelty to prove instances of prior user. This the Defendants have not done; they have merely alleged generally that the inventions are not novel: *Bovill* v. *Goodier* (1); *Daw* v. *Eley* (2); *Bovill* v. *Smith* (3); *Finnegan* v. *James* (4).

The Defendants also object that there is no "practical value" in the inventions. It is not necessary to prove practical value. We have proved some utility in them, and any amount of utility is sufficient to support a patent: *Morgan* v. *Seaward* (5); *Betts* v. *Walker* (6).

It is also alleged that the claims, and especially the fifth claim, are too general. That is not the case if the whole specification is read together, and that must always be done in construing a claim: *Kay* v. *Marshall* (7); *Beard* v. *Egerton* (8); *Arnold* v. *Bradbury* (9).

With respect to the second claim, against which the main arguments and evidence were directed in the Court below, it is said that it is not a proper subject for a patent, being simply an im-

(1) Law Rep. 1 Eq. 35.
(2) Ibid. 38.
(3) Ibid. 2 Eq. 459.
(4) Ibid. 19 Eq. 72.
(5) 2 M. & W. 544.
(6) 14 Q. B. 363.
(7) 1 My. & Cr. 373.
(8) 8 C. B. 165.
(9) Law Rep. 6 Ch. 706.

(1) L.C. 35 Beav. 264; 11 Jur. N.S. 960

proved use of an old process. That is not so; the Plaintiff proposes a new process, an entire change in the *modus operandi*, by which the carbonic acid may be eliminated and the sulphuretted hydrogen driven forward, which had never been done before; and he claims the discovery of the scientific principle involved in the operation, and the invention of the best method for applying it. Patents have been repeatedly granted on similar grounds: *Neilson* v. *Harford* (1); *Crane* v. *Price* (2); *Helliwell* v. *Dearman* (3); *Ralston* v. *Smith* (4); *Young* v. *Fernie* (5); *Muntz* v. *Foster* (6); *Hills* v. *London Gas Light Company* (7).

Argument.

Lastly, it is objected that the improvements contained in the second claim had been anticipated by experiments in the Defendants' works. It may be true that they had made experiments tending towards the same invention, but they had been unsuccessful, and had produced no practical result. The mere fact of experiments being made in the same direction is not an anticipation of an invention: *Bentley* v. *Fleming* (8); *Galloway* v. *Bleaden* (9); *Murray* v. *Clayton* (10); *Betts* v. *Menzies* (11); *Hill* v. *Evans* (12); *Jones* v. *Pearce* (13); *Lewis* v. *Marling* (14).

JAMES, L.J., delivered the judgment of the Court (*James*, L.J., *Baggallay*, J.A., and *Lush*, J.) as follows:—

Judgment, C. A.

This suit has been instituted under very peculiar circumstances. The Plaintiff was one of a body of public officials appointed under the provisions of the *Metropolitan and City of London Gas Act* of 1868, called gas referees. Their powers, functions, and duties, so far as it is material to refer to them, are contained in the following sections of the Act:—[His Lordship then read the 34th, 35th, and 36th sections of the Act before referred to.]

In the performance of his duties, the Plaintiff was in constant communication with the managers of the Metropolitan Gasworks,

(1) 1 Webs. Pat. Ca. 331.
(2) Ibid. 393; S. C. 4 My. & Cr. 580.
(3) 1 Webs. Pat. Ca. 401 (n.)
(4) 11 C. B. (N.S.) 471; 11 H. L. C. 223.
(5) 4 Giff. 577.
(6) 2 Webs. Pat. Ca. 92.
(7) 5 H. & N. 312.
(8) 1 Car. & Kir. 587.
(9) 1 Webs. Pat. Ca. 521.
(10) Law Rep. 7 Ch. 570.
(11) 11 W. R. 1.
(12) 4 D. F. & J. 288.
(13) 1 Webs. Pat. Ca. 121.
(14) Ibid. 493.

C. A. 1876 PATTERSON v. GASLIGHT AND COKE CO. Judgment, C. A.

and became intimate with their processes and their results. As the object of the appointment of the referees was to secure for the public gas of the utmost purity which could reasonably be required of the companies, it was, of course, their duty to ascertain what, under all the circumstances of each case, would be a reasonable requisition, and in the performance of this duty to discuss with and to suggest to the managers, as practical men, and to discuss with and to suggest to one another, the existing impurities, the probable cause of them, and the best means practically available for removing such causes. The gas companies had failed to supply to the public a gas which did not contain a very considerable amount of sulphur, and not only was that amount excessive, but the gas shewed, according to the Plaintiff, variations in that amount from day to day, which the makers could not account for. With the same coal, the same process of manufacture, the same purifying process, the gas came out sometimes very pure and sometimes very impure. Revolving these things in his mind, the Plaintiff says that he discovered the cause of the defect, and with it a simple and effectual means of removing such cause. The discovery may be stated shortly thus: After a certain preliminary process of purification in what are called washers and scrubbers, the gas, which was still very impure, containing a large quantity of carbonic acid, sulphuretted hydrogen, and other sulphur compounds, was passed through purifiers containing lime and oxide of iron. The oxide of iron would absorb and remove sulphuretted hydrogen, but had little or no effect on the other sulphur compounds. The lime was capable of absorbing the carbonic acid, and also the sulphuretted hydrogen, but had no effect, as lime, on the other sulphur compounds; but, in absorbing the sulphuretted hydrogen, it became a sulphide of calcium, in which state it was a very efficient agent for removing the other sulphur compounds. The lime was therefore capable, first as lime and then as sulphide of calcium, of removing the carbonic acid and the sulphuretted hydrogen, and to a great extent the other sulphur compounds. But the Plaintiff, as he alleges, discovered that a great chemical truth had been overlooked or neglected—viz., that carbonic acid would decompose sulphide of calcium, and set free again the sulphur which had been absorbed, and he therefore discovered, what had been overlooked, that it

was essential that the gas should be entirely deprived of its carbonic acid in the first instance. The lime in the subsequent purifier or purifiers would then be partly pure lime, partly sulphide of calcium. The lime would go on absorbing sulphuretted hydrogen until it became wholly sulphide of calcium, and the sulphide of calcium would continue taking up the other sulphur compounds. When this truth presented itself to the Plaintiff's mind the remedy was very obvious. From the great affinity between lime and carbonic acid it is easy to absorb the latter, and practically speaking, carbonic acid would not escape from a vessel containing lime, unless and until the latter had been converted into a carbonate. Having satisfied himself by deduction and by experiments that the solution of the sulphur difficulty was to be found in the proper use of the affinity between carbonic acid and lime, he confidentially informed his colleagues of his discovery, and, as alleged, it was with his permission that the description of his lime process was given in the report next to be mentioned, and with a perfect understanding on their part that he was to take out a patent for his said discovery before the issue of the report. The report contains the first statement of the discovery; it is the first piece of writing in which anything is formulated or stated with respect to it. The report bears date the 31st of January, 1872, and appears to have been in print about that time. In that report no mention is made by the referees of any special discovery by one of them, or of any intention to patent it by any of them. The report is a long document. It is headed, "Report on Sulphur Purification at the *Beckton Gasworks* by the Gas Referees." It purports to give an account of what has been done at the *Beckton Works* of the Defendants, and under the head "Remedies" it proceeds thus (*inter alia*):—"The prime object to be sought is to utilize and perfect the existing processes of purification. The referees feel confident that such a result is obtainable. From experiments which they have made they can state that lime in the form of sulphide of calcium—*i.e.*, saturated with sulphuretted hydrogen—is a perfectly adequate purifying agent for sulphur." And again: "The referees feel assured that perfect results would be obtainable from the lime process of purification if carbonic acid were excluded from the purifiers."

C. A. 1876

PATTERSON v. GASLIGHT AND COKE CO.

Judgment, C. A.

The experiments are described as their experiments, made at their office, and all the recommendations and suggestions are made as the official recommendations and suggestions of the whole body, based upon facts officially ascertained for and by them, and the whole report purports to be the production of the whole body, each of them applying, as in duty bound, his intellect and mind to the subject. The report was kept back from the official authorities until the 26th of March, and a few days afterwards it was circulated among the gas companies and generally. It would have been immediately the duty of the officers of the gas companies to adopt the suggestions of the report (if they had not previously done so), and it became immediately the duty of the referees to fix the maximum of impurity to be permitted, having regard to the means suggested by them. The Plaintiff says that in fact this was done, that such a maximum was fixed, and that the Defendant company did adopt, and with great success, the plan of the referees. For months the report was discussed, written about, and lectured upon as the referee's report, and they themselves, in subsequent reports, referred to it by that designation. It was an official document emanating from the Plaintiff and others, inviting, and intended and calculated to compel the gas companies to use the means therein described, and without any intimation that there was any patent right or private property of the Plaintiff, or any one, in that which, to all appearance, was given to the public as public property. It appears, however, that on the 9th of March, the Plaintiff had presented his petition for letters patent for improvements in the purification of coal gas, lodging the usual provisional specification. Letters patent were sealed on the 28th of May. On the 9th of September the complete specification was lodged; and then it appeared that the Plaintiff had obtained a patent for that which was in substance and effect the referee's report, and he has filed a bill against the Defendants for having infringed such his patent right by doing the very things which they were so officially instructed, invited, and, in effect, commanded by him to do. Although it is not necessary for the determination of this suit to pronounce any final decision on this point, we deem it right to say that we think it, at the very least, very questionable whether it can be competent for

a member of an official commission or committee to take out a patent for the subject-matter of their official investigation, for the results of such investigation embodied in their official report to the public authorities, or to treat as piratical infringers those who have followed the suggestions and directions contained in such report. The suggestion that the report was kept back for the purpose of enabling one of the referees to apply for a patent is not entitled to much favour. It is to be borne in mind that the report then made belonged absolutely to the State. Every fact and figure in it had been ascertained and obtained at the public expense; every hour of every referee, and of the secretary employed in the production of it, was public time. It was, of course, printed at the public cost. The withholding or wilful delaying of it was a plain breach of public duty, and it is difficult to see how the Plaintiff can be in a better position than if he and his colleagues had done their duty and duly presented their report as soon as it was completed. The consideration for every patent is the communication of useful information to the public. What consideration is there when the information was already the property of the State?

The specification of the patent claims five different matters. If one of them is bad, as there has been no disclaimer, of course the patent must fail, and the Defendants insist that every one of them is bad.

[His Lordship read the first claim, and continued:—]

There is really in this nothing but the enunciation of a chemical truth, that pure sulphides of calcium will absorb the sulphur compounds. The Plaintiff believed that he had discovered that chemical truth, although it had been taught for many years in many books, and was well known to chemists. There is no invention of any particular process or means of employing the pure sulphide of calcium. If pure sulphide of calcium is to be used it must be used in some separate holder of it, and the thing holding it would be a separate purifier, and there is nothing, therefore, in any previous part of the specifications to limit the universality of the claims to the employment of sulphides of calcium for the removal of sulphur in other forms than sulphuretted hydrogen. It is obviously impossible to support such a claim as that, which

C. A. 1876

PATTERSON v. GASLIGHT AND COKE CO.

Judgment, C. A.

was plainly based on the Plaintiff's mistaken idea that he had discovered that peculiar property in sulphide of calcium. Passing over for the moment the second claim, which has been the principal subject of controversy in evidence and argument, the Defendants challenge absolutely the novelty and utility of the other three. The Plaintiff so challenged has failed to produce any evidence that they are of the slightest value. The Defendants' evidence is, in general terms, that they have been tried and abandoned.

[His Lordship then referred to the Plaintiff's evidence and continued:—]

This evidence is utterly valueless as evidence of novelty and utility. The improvements have not been tried by the Plaintiff, or any of his witnesses, even experimentally, in a laboratory, or with models. The one experiment made by the Plaintiff, shewing that a mixture of sulphur and sawdust in a tumbler removed a certain quantity of sulphur from the gas supplied to the office is evidence of that chemical fact, but not evidence that the fact is of the slightest practical utility. In our opinion the Plaintiff has failed to prove either the novelty or utility of anything claimed under any of the last three heads.

The great controversy of fact and argument, as before stated, has related to the second head of claim, which is as follows:—[His Lordship read the second claim, and continued:—] There is in that no suggestion of any new apparatus—of any new process. There is no device or scheme of any kind. Lime purifiers in succession were in general, almost universal use, wherever lime could be freely used. The gas entered one, passed from that to another, and then generally, or sometimes, to a third; the gas, partly purified in the washers and scrubbers, passed through the series of lime purifiers into an oxide of iron purifier. That was the process before, and that is to remain the process after and under the Plaintiff's patent. What he claims to have discovered is, that if the carbonic acid, which is the first thing taken up by the lime, is not wholly taken up at the beginning, and is allowed to enter the last purifier or purifiers, it in fact poisons the latter, decomposes the sulphide of calcium already formed, disengages the other sulphur absorbed by the sulphide, and of course fills the gas again

with the sulphur impurities which had been removed. This is a very valuable working caution and direction, but it is impossible to make anything more of it than a working caution and direction. It really amounts to nothing more than a direction to be sufficiently liberal in the use of the caustic lime in the first stage, and an instruction that the moment it is so far carbonated as not to arrest the carbonic acid, it should be removed and a fresh supply of lime got. It may be a direction and instruction of the greatest possible value and utility, but it is utterly impossible to make such a direction and instruction, however valuable, the subject of a patent. It does not differ in principle, although it does differ enormously in scale, from a cook's instructions and directions as to the best means of manipulating articles of food. How could an infringement of such a patent be predicated? Would it do to say, in the days of your uninstructed ignorance you allowed the lime to remain three or four days; now that I have taught you better you remove it every forty-eight hours? Could the Court say in words (if not in words, could it in effect say), we restrain you from working your lime purifying process in any such way as will not allow the carbonic acid to enter the last purifier in sufficient quantity to do substantial mischief, or in less quantity on an average than it used to do in former times on an average? No one has a right to prevent a workman from using care to keep his tools in the most efficient state. No one has a right to prevent a manufacturer from cleansing his vessels, and throwing away the useless contents whenever he likes, or to ask him his motives or intentions in doing so.

Besides this, however, the Defendants insist that what they are doing now, and which is alleged to be the infringement of the patent at their *Beckton Works*, they were doing at those works before the date of the patent, and that what they are doing at their *Bow Works* they had been doing for years. The evidence on this subject on the part of the Defendants is absolutely overwhelming. It is direct, positive, and unequivocal, and, if false, it must be wilfully false and perjured within the knowledge of scores of persons, and against this there is merely the speculative conclusion derived from results. The Plaintiff says: "Up to a certain time before you knew of my process, as described in the referee's report,

C. A. 1876 PATTERSON v. GASLIGHT AND COKE CO. Judgment, C. A.

you failed to purify your gas properly; since you became acquainted with my process you have purified your gas effectually. The conclusion is inevitable that you have made some change, and as you are using my process, you must have been using something not my process before, and your evidence to the contrary must be disregarded." We cannot so deal with such a body of witnesses and such a mass of evidence, including unmistakable documentary evidence, which was in existence before the date of the letters patent.

On the 15th of February, 1872, the Plaintiff writes to Mr. *Trewby*, as follows:—

"As carbonic acid has a greater affinity for lime than S. Hyd. has, it may be confidently expected that a tray of clean lime will take out C. A. in greater proportion than it takes out S. H. . . . Or perhaps (you can judge best) you might pass all your gas in each purifying house through one purifier first, and change the lime in this one quickly, as the back pressure shews it turned into carbonate, or else as soon as it gets foul."

And on the 29th, Mr. *Trewby* writes as follows:—

"I may add that within the last few days, I have been working the lime purifiers in a somewhat different manner. That is to say, I have kept certain purifiers for the purpose of testing the carbonic acid only and the remainder for the sulphur. I am in hopes that this will do good."

Mr. *Trewby* swears, and there is not the slightest reason to doubt his evidence, that what is stated in that letter is according to the facts, and that being so there was a clear prior user. The letter contains, moreover, a clear anticipation of the exact principle which the Plaintiff claims to have been the first discoverer of.

Dr. *Letheby* swears as follows, as to what he found on the 11th of March, when he visited the Defendants' works:—

"I found that the company were working four purifiers in a set, the first two being for carbonic acid and the last two for sulphur; and when the first vessel shewed an effluent with carbonic acid it was changed, and the succeeding purifier brought into action. In fact, the process of the Plaintiff, as described in the provisional specification, was strictly carried out."

And the date of his visit, and what was shewn him on that day, are conclusively corroborated, if they required corroboration, by Mr. *Evans's* diary of that date. It is possible that what Mr. *Trewby* said and did on the 29th of February, and a few days before, may be accounted for by what the Plaintiff says in his letter of the 27th of March, 1872:—"All the suggestions in the report have been communicated to *Trewby* and others months ago."

We are satisfied that *Trewby's* evidence is true, and *Trewby's* letter genuine; we are satisfied that Dr. *Letheby's* evidence is true, and *Evans's* diary genuine. We do not think it necessary to go any further into the details of the evidence.

Whether the Defendants have sufficiently accounted for the difference in the results produced in different parts of the year 1872, or what was or were the cause or causes of such difference, opens a field of speculation into which we are not called upon to enter. It cannot affect the fact (as to which there is no legitimate ground for doubt) that prior to and on the 9th of March, 1872, the process described in the Plaintiff's specification was in actual use and work at *Beckton*, and that a process in principle and substance the same was in actual use and work at *Bow*. It is possible, indeed probable, that the company became more liberal in the supply, and the manager more careful in the use, of the lime. But that is, in our judgment, wholly immaterial. The Plaintiff's case has, in our judgment, wholly failed, and his bill must be dismissed with costs, including the costs of the appeal.

Solicitors for Appellants: *Curtis & Bedford.*
Solicitors for Plaintiffs: *Bevan & Whitting.*

END OF VOL. II.

INDEX.

ABATEMENT — Annuity — Residue and remainder - - - - - 628
See RESIDUARY GIFT. 2.

ACCEPTANCE OF OFFER — *Vendor and Purchaser—Contract—Specific Performance—Offer to sell—Withdrawal before Acceptance—Sale to another Person—Notice.*] An offer to sell property may be withdrawn before acceptance without any formal notice to the person to whom the offer is made. It is sufficient if that person has actual knowledge that the person who made the offer has done some act inconsistent with the continuance of the offer, such as selling the property to a third person. *Semble*, that the sale of the property to a third person would of itself amount to a withdrawal of the offer, even although the person to whom the offer was first made had no knowledge of the sale. *Semble*, that the acceptance of an offer to sell constitutes a contract for sale only as from the time of the acceptance. The contract does not relate back to the time when the offer was made. The owner of property signed a document which purported to be an agreement to sell it at a price fixed. But a postscript was added, which he also signed—"This offer to be left over until Friday 9 A.M.":—*Held*, that the document amounted only to an offer, which might be withdrawn at any time before acceptance, and that a sale to a third person which came to the knowledge of the person to whom the offer was made was an effectual withdrawal of the offer. Decision of *Bacon*, V.C., reversed. DICKINSON v. DODDS - - - - - - - 463

ACCOMPLICE—Fraudulent debtor - - 799
See PROSECUTION OF BANKRUPT. 2.

ACCOUNTS—Adjustment of interest on debts—Tenant for life - - - 199
See ADJUSTMENT OF ACCOUNTS.

—— Mortgagee in possession - - 617
See LIMITATIONS, STATUTE OF. 1.

—— Mortgagee in possession - - 148
See MORTGAGEE IN POSSESSION.

ACQUIESCENCE—Shareholder - - 663
See MISREPRESENTATION IN PROSPECTUS.

ACT OF BANKRUPTCY — Assignment of all debtor's property - - - 256
See ASSIGNMENT OF ALL DEBTOR'S PROPERTY.

ACT OF BANKRUPTCY—*continued.*
—— Infant - - - - - 227
See INFANT TRADER.

ACTION—Administration—Decree on summons by District Registrar - - 608
See DISTRICT REGISTRAR.

—— Changed into information - - 221
See AMENDMENT OF PLEADINGS.

—— Creditor—Failure of debtor to pay composition - - - - - 63
See INJUNCTION IN BANKRUPTCY.

—— Creditor—On behalf of others - 109
See ACTION ON BEHALF OF SEVERAL.

—— Joinder of - - - - 111
See JOINDER OF CAUSES OF ACTION.

—— Recovery of land—Delivery up of deed—Joinder - - - - 111
See JOINDER OF CAUSES OF ACTION.

ACTION ON BEHALF OF SEVERAL — *Practice — Judicature Acts — Creditor's Action for Administration of Real and Personal Estate — Action by Single Creditor—Rules of Court*, 1875, *Order XVI. r. 9, Appendix A., Part 2, s. 1, Form 1.*] In a creditor's action for the administration of the real estate of a deceased person (who has not devised the real estate to trustees with power to sell and give receipts), the Plaintiff must sue on behalf of all creditors.—*Cooper v. Blissett* (1 Ch. D. 691) not followed. WORRAKER *v.* PRYER - - - - - 109

ADDING FRESH EVIDENCE—Pending proceedings - - - - - 729
See PROSECUTION OF PENDING PROCEEDINGS. 4.

ADJUDICATION OF BANKRUPTCY — Amendment of subsequent liquidation 424
See POSTPONED CREDITORS.

—— Appeal—*Locus standi* of Appellant 229, 797
See BANKRUPTCY APPEAL.

—— Petition for - - - - 22
See PETITION FOR ADJUDICATION.

ADJUSTMENT OF ACCOUNTS—*Summons—Chief Clerk's Certificate—Payment of Debts—Payment of Interest on Debts by Tenant for Life.*] A tenant for life of real estate, upon which the debts of the testator have been ascertained to be a charge, must keep down all the interest which accrues

ADJUSTMENT OF ACCOUNTS—*continued.*
due. The principle laid down in *Allhusen* v. *Whittell* (Law Rep. 4 Eq. 295) applied to real estate.—*Greisley* v. *Earl of Chesterfield* (13 Beav. 288) not followed. MARSHALL v. CROWTHER 199

ADMINISTRATION — Action for — Decree on summons by District Registrar - 608
See DISTRICT REGISTRAR.

—— Action for—Single creditor - - 109
See ACTION ON BEHALF OF SEVERAL.

—— Keeping down interest—Tenant for life 199
See ADJUSTMENT OF ACCOUNTS.

—— Preference of creditors - - 104
See FRAUDULENT CONVEYANCE.

—— Retainer by executor—Debt due from executor - - - - 420
See RETAINER BY EXECUTOR.

ADMISSION IN PLEADING—Motion for judgment - - - - 686
See MOTION FOR JUDGMENT.

AFFIDAVIT—Evidence by—Pending proceedings - - - - - 586
See PROSECUTION OF PENDING PROCEEDINGS. 2.

AFTER-ACQUIRED PROPERTY — Covenant to settle - - - - - 363, 706
See COVENANT TO SETTLE. 1, 2.

—— Uncertificated bankrupt - - - 806
See SUSPENSION OF BANKRUPTCY.

AGENT—Company—Benefit to himself - 1
See FIDUCIARY RELATION. 1.

—— Consigning goods to his principal—Passing of property - - - - - 278
See SECURITIES FOR BILLS OF EXCHANGE.

—— Letter from, to principal - - - 644
See PRODUCTION OF DOCUMENTS. 2.

AGREEMENT—Promoters of company - 621
See MISREPRESENTATION IN PROSPECTUS. 1.

AGREEMENT FOR SETTLEMENT—*Lien on Unsettled Property.*] Immediately before a marriage the intended husband signed a memorandum agreeing that certain bonds (in the memorandum called "stocks"), which were part of the wife's property, should be transferred to the wife and her son by a former marriage in trust for her, "neither party having power to dispose of the said stocks without consent of both parties to such disposal." After the marriage the husband obtained possession of part of these bonds without the consent of the son, and disposed of them:—*Held* (affirming the decision of *Malins*, V.C.), that the husband was liable to make good the amount of the bonds so disposed of by him, and that the wife and her trustee were entitled to a lien for the amount upon all other property of the wife which remained in specie, and that the amount must be settled. HASTIE v. HASTIE - - - - - 304

ALLOWANCES—Mortgagee in possession—Accounts - - - - - - 148
See MORTGAGEE IN POSSESSION.

AMALGAMATION OF COMPANIES—Costs of payment out of Court - - - 360
See COSTS UNDER LANDS CLAUSES ACT.

AMENDMENT OF PLEADINGS — *Writ — Judicature Acts — Action — Information — Pending Motion.*] An action may by amendment of the writ and statement of claim be turned into an information and action without prejudice to a pending motion in the action, the necessary sanction of the Attorney-General being obtained. CALDWELL v. PAGHAM HARBOUR RECLAMATION COMPANY - - - - - - 221

—— Pending proceedings - - - - 729
See PROSECUTION OF PENDING PROCEEDINGS. 4.

ANCIENT LIGHTS - - - - - 165
See LIGHT AND AIR.

ANNUITY—Abatement of—Residue or remainder
See RESIDUARY GIFT. 2. [628

ANNULMENT OF ADJUDICATION—Scheme of settlement—Postponed creditors - 424
See POSTPONED CREDITORS.

ANSWER—After demurrer overruled objection
See DEMURRER. 2. [298

—— Patent suit—Particulars of prior user 533
See PATENT SUIT.

ANTICIPATION OF PATENT - - - 812
See SPECIFICATION OF PATENT.

APPEAL—After inrolment - - - 304
See INROLMENT OF DECREE.

—— Bankruptcy - - - - 229, 797
See BANKRUPTCY APPEAL.

—— Bankruptcy—Rehearing - - - 749
See REHEARING IN BANKRUPTCY.

—— For costs - - - - - - 69
See APPEAL FOR COSTS.

—— Registration of resolution for liquidation 326
See RESOLUTION FOR LIQUIDATION, 2.

—— Security for costs - - 67, 325, 811
See SECURITY FOR COSTS. 1, 2, 3.

—— Staying proceedings - - - - 492
See STAYING PROCEEDINGS. 1.

APPEAL FOR COSTS — *Practice — Discretion — Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 49.] An order declaring that the Defendant had committed a breach of an injunction, but giving no directions, except that the Defendant should pay the costs of the application to commit, may be appealed from, and is not within the rule against appeals for costs. WITT v. CORCORAN - 69

APPLICATION OF DEPOSIT—Railway company—Insolvency - - - - 313
See DEPOSIT BY COMPANY.

APPOINTMENT OF RECEIVER—Date of - 291
See RECEIVER. 2.

—— Interim appointment of Plaintiff - 302
See RECEIVER. 3.

APPORTIONMENT—Costs—Lands Clauses Act [360
See COSTS UNDER LANDS CLAUSES ACT.

—— Purchase-money—Sale by trustee and beneficiary - - - - - 540
See SALE BY TRUSTEE.

APPROPRIATION OF CONSIGNMENTS—Bill of exchange - - - - - 278
See SECURITIES FOR BILLS OF EXCHANGE

ARBITRATOR—Misconduct of—Corruption 113
See MISCONDUCT OF ARBITRATOR.
ARREARS OF INTEREST—Statute of Limitations - - - - - 713
See LIMITATIONS, STATUTE OF. 2.
ARTICLES OF SETTLEMENT—Limitation to children - - - - 44
See EXECUTORY SETTLEMENT.
ARTIFICIAL MOUND—Nuisance—Damp 692
See NOISE.
ASSETS—Unlimited insurance company—Marshalling - - - - 476
See MARSHALLING.
ASSIGNMENT OF ALL DEBTOR'S PROPERTY—*Bankruptcy—Bill of Sale—Fresh Advance.*] A trader who owed his brother £800 applied to him for a further advance, which the brother declined to make without security; and ultimately, by letters of the 30th of June and the 1st of July, it was agreed that the brother should advance £150, and that on his doing so the debtor should give him a bill of sale of his plant, furniture, and book debts, which comprised substantially his whole property. The brother advanced £50 in August, £50 in September, and £50 on the 6th of October. On the last-named day, being the expiration of the time allowed by another large creditor, who was known by the brother to be pressing for payment of his debt, the debtor gave the brother the bill of sale, which was expressed to be to secure £900 then due, £50 then advanced, and any future advances. In the course of October the brother advanced £100 more. In November the above-mentioned creditor took proceedings in bankruptcy, relying on the bill of sale as an act of bankruptcy:—*Held* (reversing the decision of the Chief Judge), that the giving the bill of sale was not an act of bankruptcy, as it was given in pursuance of an agreement by which a substantial further advance was obtained; and that the circumstances negatived the conclusion that the giving it was purposely postponed till the debtor's circumstances were desperate.—*Ex parte Fisher* (Law Rep. 7 Ch. 636) distinguished. *Ex parte* KING. *In re* KING - - - - - - - 256
—— Principle on which the Court acts - 797
See BANKRUPTCY APPEAL.
ATTACHMENT—Person—Costs - - 528
See COSTS OF ATTACHMENT.
ATTENDANCE OF WITNESS—Compulsion 575
See WITNESS IN WINDING-UP.

BANKRUPTCY—Appeal - - 229, 797
See BANKRUPTCY APPEAL.
—— Appeal from registration of resolution for liquidation - - - - 326
See RESOLUTION FOR LIQUIDATION. 2.
—— Appeal—Order for prosecution of bankrupt [786, 799
See PROSECUTION OF BANKRUPT. 1, 2.
—— Assignment of all debtor's property - 256
See ASSIGNMENT OF ALL DEBTOR'S PROPERTY.
—— Composition with creditors—Taxation 430
See BANKRUPTCY JURISDICTION.
—— Concurrent bankruptcy and liquidation 231
See RESOLUTION FOR LIQUIDATION. 1.
BANKRUPTCY—*continued.*
—— Debtor's summons - - - 9, 423
See DEBTOR'S SUMMONS. 1, 2.
—— Disclaimer of lease - - - 802
See DISCLAIMER.
—— Fraudulent preference - - - 127
See FRAUDULENT PREFERENCE.
—— Infant trader - - - - 227
See INFANT TRADER.
—— Injunction - - - - - 63
See INJUNCTION IN BANKRUPTCY.
—— Issues—Power to disregard verdict—New trial - - - - - 72
See ISSUES IN BANKRUPTCY.
—— Joint and separate estate - - 172
See JOINT AND SEPARATE ESTATES.
—— Liquidation—Resolution - - 231, 326
See RESOLUTION FOR LIQUIDATION. 1, 2.
—— Liquidation—Trustee—Interest - 57
See TRUSTEE IN LIQUIDATION.
—— Petition for adjudication - - 22
See PETITION FOR ADJUDICATION.
—— Policy of insurance—Wife's separate estate [266
See MARRIED WOMEN'S PROPERTY ACT.
—— Proof—Creditor holding security - 485
See CREDITOR HOLDING SECURITY.
—— Proof—Securities for bills of exchange 278
See SECURITIES FOR BILLS OF EXCHANGE.
—— Prosecution of bankrupt - - 786, 799
See PROSECUTION OF BANKRUPT. 1, 2.
—— Rehearing - - - - 749
See REHEARING IN BANKRUPTCY.
—— Rehearing by County Court Judge - 786
See PROSECUTION OF BANKRUPT. 1.
—— Resolution for composition - - 323
See RESOLUTION FOR COMPOSITION.
—— Resolution for liquidation - 231, 326
See RESOLUTION FOR LIQUIDATION. 1, 2.
—— Scheme of settlement—Rights of postponed creditors - - - - 424
See POSTPONED CREDITORS.
—— Suspension of—After-acquired property 806
See SUSPENSION OF BANKRUPTCY.
—— Voluntary settlement - - - 54
See VOLUNTARY SETTLEMENT.

BANKRUPTCY APPEAL—*Adjudication—Locus Standi of Appellant—Holder of Bill of Sale alleged to be invalid—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 71—*Assignment of all Debtor's Property.*] An adjudication of bankruptcy was made, founded upon the execution by the debtor of a bill of sale which was held to be an act of bankruptcy:—*Held* (affirming the decision of *Bacon*, C.J.), that the holder of the bill of sale was entitled to appeal from the adjudication.—Statement of the principles which guide the Court in determining whether an assignment of all a debtor's property is an act of bankruptcy. *Ex parte* THODAY. *Ex parte* ELLIS. *In re* ELLIS 229, 797

BANKRUPTCY JURISDICTION—*Composition—Costs of Debtor's Solicitor—Action against Debtor—Injunction—Taxation—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 72, 126.] The Court of Bankruptcy has jurisdiction in a case of composi-

BANKRUPTCY JURISDICTION—*continued.*
tion to order the taxation of the bill of costs of the debtor's solicitor.—In a case of composition, where a trustee was appointed, to whom the debtor gave a bill of sale of his property to secure the payment of the composition, the bill of sale containing a trust for sale of the property and for payment of the costs of the proceedings out of the sale moneys, an action, brought against the debtor by his solicitor for his costs incident to the proceedings, was restrained, on the terms of the trustee paying a sum of money into Court, and giving an undertaking to pay whatever further sum might be found due on the taxation of the bill of costs. *In re* Dixon. *Ex parte* Shepherd - - 430

BILL OF DISCOVERY—*Claim to Property in India — Improper Tribunal — Demurrer.*] The Plaintiff filed a bill of discovery to obtain inspection of documents in the Defendant's possession in *England*, in aid of proceedings about to be taken for the recovery of land in *India*:—*Held*, that the property claimed being in *India*, and the Defendant being capable of being sued in *India*, an English Court was not the proper tribunal to decide upon the Plaintiff's claim, and a bill of discovery could not be maintained in aid of such a claim. Reiner *v.* Marquis of Salisbury 378

BILL OF EXCHANGE—Securities for—Doctrine of *Ex parte Waring* - - 278
See Securities for Bills of Exchange.

BILL OF SALE—Assignment of all debtor's property - - - - 256
See Assignment of all Debtor's Property.

—— Holder of — Appeal from adjudication of bankruptcy - - - 229, 797
See Bankruptcy Appeal.

—— Registration - - - - 291
See Registration of Bill of Sale.

BONA FIDES—Kindness to debtor - 323
See Resolution for Composition.

BOND—Railway company—Entry on land 201
See Compensation under Railway Clauses Act. 1.

—— Security for costs - - - 811
See Security for Costs. 3

BREACH OF TRUST—Interrogatories for Plaintiff
See Interrogatories. [704

BUILDING LEASE—Under 1 Will. 4, c. 65 719
See Lease under 1 Will. 4, c. 65.

CASES: *Allhusen* v. *Whittell* (Law Rep. 4 Eq. 295) followed - - - - 199
See Adjustment of Accounts.

—— *Bennett* v. *Moore* (1 Ch. D. 692) followed 686
See Motion for Judgment.

—— *Bourne, Ex parte* (2 Gleg. & P. 137) distinguished - - - - 424
See Postponed Creditors.

—— *Cooper* v. *Blisset* (1 Ch. D. 691) not followed
See Action on behalf of Several. [109

—— *Dalgleish's Settlement* (1 Ch. D. 26) overruled
See Trustee Acts. 2. [483

—— *Fisher, Ex parte* (Law Rep. 7 Ch. 636) distinguished - - - - 256
See Assignment of all Debtor's Property.

CASES—*continued.*

—— *Greisley* v. *Earl of Chesterfield* (13 Beav. 288) not followed - - - 199
See Adjustment of Accounts.

—— *Hackett* v. *Baiss* (Law Rep. 20 Eq. 494) explained - - - - 165
See Light and Air.

—— *Kibble, Ex parte* (Law Rep. 10 Ch. 373) distinguished - - - - 227
See Infant Trader.

—— *Leonard, Ex parte* (Law Rep. 19 Eq. 269) explained - - - - 786
See Prosecution of Bankrupt.

—— *Maryport Railway Act* (32 Beav. 397) not followed - - - - 360
See Costs under Lands Clauses Act.

—— *Merry* v. *Nickalls* (Law Rep. 8 Ch. 205) followed - - - - 492
See Staying Proceedings. 1.

—— *Muirhead, Ex parte* (2 Ch. D. 22) distinguished
See Debtor's Summons. 2. [423

—— *Norton, Ex parte* (Law Rep. 16 Eq. 39) questioned - - - - 72
See Issues in Bankruptcy.

—— *Paper Staining Company, In re* (Law Rep. 8 Ch. 595) followed - - - 63
See Injunction in Bankruptcy.

—— *Perry* v. *Oriental Hotels Company* (Law Rep. 5 Ch. 420) - - - - 726
See Receiver. 4.

—— *Pile* v. *Salter* (5 Sim. 411) disapproved 494
See Rule in Wild's Case.

—— *Ross* v. *Gibbs* (Law Rep. 8 Eq. 522) explained
See Production of Documents. 2. [644

—— *Shepherd* v. *Harrison* (Law Rep. 5 H. L. 116) distinguished - - - 278
See Securities for Bills of Exchange.

—— *Troughton* v. *Gitley* (Amb. 629) distinguished
See Postponed Creditors. [424

—— *Viant's Settlement Trusts, In re* (Law Rep. 18 Eq. 436) not followed - - 363
See Covenant to settle. 1.

—— *Wall* v. *Bright* (1 Jac. & W. 494) explained 499
See Devise of Trust Estates.

—— *Waring, Ex parte* (19 Ves. 345) distinguished [278
See Securities for Bills of Exchange.

—— *Wild's Case* (6 Rep. 16, b) followed - 494
See Rule in Wild's Case.

CERTIFICATE—Special examiner - - 217
See Special Examiner.

CESTUI QUE TRUST—Concurrence in sale by trustee - - - - 540
See Sale by Trustee.

—— Non-communication of trust to - 104
See Fraudulent Conveyance.

CHANCEL — Repairs — Purchase-money under Lands Clauses Act - - - 225
See Reinvestment of Purchase-money. 1.

CHARGE — Legacy — Condition of coming into possession of land - - - 177
See Legacy charged on Corpus.

CHARITY—Eleemosynary or ecclesiastical 554
See Charity Scheme.
—— Gift to—Mortmain - - - 222
See Mortmain.

CHARITY SCHEME—*Eleemosynary or Ecclesiastical—Trustees—Religious Opinions.*] The charity of *St. John's Hospital, Bath*, with the chapel of *St. Michael* annexed, was founded for the support of a certain number of poor persons of both sexes, not being restricted to any particular religious denomination. The Master of the Hospital was to be a member of the Church of *England*, who was to receive a fixed stipend, and perform the service in the chapel according to the Liturgy of the Church of *England*. The trustees of the charity were to manage the trust property and to appoint the Master, to repair and maintain the chapel attached to the hospital, and to elect the almspeople:—*Held*, that the primary object of the charity was eleemosynary, and that it was not necessary that the trustees should be confined to persons holding the doctrines of the Established Church; and a scheme for the management of the charity was directed to be altered by striking out any religious restriction. Attorney-General *v.* St. John's Hospital, Bath - - - - 554

CHILDREN—Gift to—Rule in *Wild's Case* 494
See Rule in Wild's Case.
—— Implied gift to - - - - 413
See Gift by Implication.

CITATION OF THIRD PARTY—*Rules of Court*, 1875, *Order xvi., r.* 18—*Bankruptcy Act*, 1869, *s.* 72 — *Jurisdiction — Injunction.*] *C.* bought goods on credit from *H.* After delivery, but before the time for payment, *C.* became bankrupt. *H.*, when the time for payment arrived, commenced an action against *S.* for the price, alleging that *C.* had bought the goods by the authority of *S.*, and either on account of *S.* or on the joint account of *S.* and *C.* *S.* thereupon served the trustee with a notice under Order xvi., rule 18, of the Rules of Court, 1875. The trustee then applied for and obtained in bankruptcy an order restraining *S.* from taking or continuing any proceedings against the trustee under Order xvi.:—*Held*, on appeal, that this order must be discharged, for that the case between *H.* and *S.* could not be tried in bankruptcy, and that *S.*, if found liable in the action, ought not to have to try the same question again in bankruptcy between himself and the trustee. *Ex parte* Smith. *In re* Collie - - - - - 51

2. —— *Practice — Judicature Acts — Specific Performance—Rules of Court*, 1875, *Order xvi., rr.* 13, 17.] *B.* agreed to purchase freehold hereditaments of *A.*, who purported to sell under a power of sale contained in a mortgage to *A.*, by *C.*, as trustee and executor of the will of *D.* After acceptance of the title, and preparation of the conveyance, *B.* received formal notice from unpaid residuary legatees of *D.* of a claim by them to the property contracted to be sold.—In an action by *A.* for specific performance of the agreement, a motion by *B.*, that the residuary legatees, who had given notice of their claim, might be added as Defendants to the action, was refused with costs, as no question arose which, for the purpose of being effectually adjudicated upon and settled, required that these residuary legatees should be added as parties. Harry *v.* Davey - - - 721

CLASS—Period of ascertaining—Gift on attaining twenty-one - - 753, 783
See Gift on attaining Twenty-one. 1, 2.

CO-DEFENDANTS—Mortgage suit—Sub-mortgagees - - - - - 223
See Counterclaim. 1.

COMMISSION—Receipt of rents - - 148
See Mortgagee in Possession.

COMPANY—Agent of company—Fiduciary relation - - - - - 1
See Fiduciary Relation. 1.
—— Debenture - - - - 337, 345
See Debenture. 1, 2.
—— Deposit—Payment out of Court—Insolvency
See Deposit by Company. [373
—— Insurance—Winding-up—Marshalling 476
See Marshalling.
—— Lands Clauses Act—Costs - - 360
See Costs under Lands Clauses Act.
—— Lien on shares—Power to refuse transfer 101
See Transfer of Shares.
—— Misrepresentation in prospectus - 621, 663
See Misrepresentation in Prospectus. 1, 2.
—— Receiver and manager - - - 726
See Receiver. 4.
—— Sale of shares—Stock Exchange - 594
See Custom of Stock Exchange. 2.
—— Transfer of shares - - - 101
See Transfer of Shares.
—— Voluntary winding-up—Powers of liquidator
See Liquidator. [366
—— Winding-up petition - 116, 610, 763
See Winding-up Petition. 1, 2, 3.
—— Winding-up—Official liquidator - 181
See Official Liquidator.

COMPENSATION UNDER RAILWAYS CLAUSES ACT—*Railway Company—Taking Lands—Entry on Deposit and Bond—Condition of Bond—Compensation for Minerals—Lands Clauses Consolidation Act*, 1845, *ss.* 63, 85—*Railways Clauses Consolidation Act*, 1845, *ss.* 78, 81.] Compensation for minerals, under sects. 78 and 81 of the *Railways Clauses Act*, 1845, is not within the condition of the bond to be given, under sect. 85 of the *Lands Clauses Act*, 1845, by a railway company desirous of entering upon lands before agreement, award, or verdict.—A railway company, being desirous of entering upon and using lands for the purchase of which they had given notice to treat, before agreement come to, award made, or verdict given, made the deposit in the bank, and gave the landowner the bond required by the 85th section of the *Lands Clauses Consolidation Act*, 1845. The company and the landowner afterwards appointed an arbitrator, who was by the terms of the reference to assess the purchase-moneys to be paid by the company in respect of the landowner's interest, and also the compensation for any damage which might have been sustained by him by reason of the execution of the railway and the works thereof, and which by virtue of the special Act, or the

COMPENSATION UNDER RAILWAYS CLAUSES ACT—*continued.*

Lands Clauses Consolidation Act, 1845, the landowner was entitled to claim against the company. The arbitrator by his award found one sum as purchase-money for the lands taken, and another sum as compensation for the execution of the works, and found separately a third sum as compensation in respect of minerals.—Upon petition by the company for payment out of their deposit:—*Held*, that the bond given by the railway company did not extend to securing the compensation for the minerals, and that the company, having paid the first two sums awarded, had fully performed the condition of their bond, and were entitled to the return of their deposit without paying or depositing the compensation awarded in respect of the minerals. *Ex parte* NEATH AND BRECON RAILWAY COMPANY - - - - - - 201

2. —— *Railway Company—Mines — Lessee—Owner's Compensation — Forfeiture—Surrender—* 8 *Vict. c.* 20), *ss.* 6, 81.] A railway company bought land without the minerals thereunder, and constructed a railway upon the land. The landowner made a lease for fifteen years of the minerals. The lessee gave to the company notice of his intention to work the minerals; the company gave him notice, and paid him under the *Railways Clauses Act*, 1845, s. 78, compensation for leaving the minerals. The lessee fell into arrear with his rent, and surrendered the lease to the landowner. A purchaser from the landowner gave to the company notice of his intention to work the minerals, and claimed compensation without regard to the payment already made to the lessee, and began to work the minerals so as to endanger the railway:—*Held*, that the company had obtained a right to support from the minerals, and that the landowner would be restrained from working the minerals, but might obtain compensation under sect. 6 or sect. 81 of the *Railways Clauses Act*, 1845, and might have obtained compensation under sect. 68 of the *Lands Clauses Act*, 1845. GREAT WESTERN RAILWAY COMPANY *v.* SMITH - - - 235

COMPOSITION DEED—Staying proceedings 547
See STAYING PROCEEDINGS. 2.

COMPOSITION WITH CREDITORS—Failure to pay—Injunction - - - - 63
See INJUNCTION IN BANKRUPTCY.

—— Payment of some and postponement of others
See POSTPONED CREDITORS. [424

—— Proof—Valuation of security - - 485
See CREDITOR HOLDING SECURITY.

—— Resolution - - - - - 323
See RESOLUTION FOR COMPOSITION.

—— Taxation of costs - - - 430
See BANKRUPTCY JURISDICTION.

COMPTROLLER IN BANKRUPTCY—Report of
See TRUSTEE IN BANKRUPTCY. [749

CONCEALMENT — Agreement by promoters of company - - - - - 621
See MISREPRESENTATION IN PROSPECTUS. 1.

CONDITION—"Coming into actual possession."
See LEGACY CHARGED ON LAND. [177

—— Impossibility—Marriage with consent of parents - - - - 753
See GIFT ON ATTAINING TWENTY-ONE. 1.

CONDITION PRECEDENT—Renewal of lease—Bankruptcy of one of the lessors - 310
See RENEWAL OF LEASE.

CONFIRMATION—Settlement—Widow—Second husband - - - - - 387
See INFANT'S SETTLEMENT.

CONSENT OF PARENTS—Impossible condition [753
See GIFT ON ATTAINING TWENTY-ONE. 1.

CONSERVATORY—Public Health Act - 634
See ORNAMENTAL GARDEN.

CONSIDERATION — Assignment of all debtor's property—Fresh advance - - - 256
See ASSIGNMENT OF ALL DEBTOR'S PROPERTY.

CONSIGNMENTS—Appropriation of - 278
See SECURITIES FOR BILLS OF EXCHANGE.

CONTINGENT INTEREST—After-acquired property - - - - - 706
See COVENANT TO SETTLE. 2.

CONTINGENT REMAINDER—*Will—Life Estate—Executory Devise.*] A testator devised to his daughter *N.* an estate for life, and after her decease to her child or children who, either before or after her death, should attain the age of twenty-one, or die under that age leaving issue at his, her, or their death, in fee simple as tenants in common; and in case there should be no child of *N.* who should attain twenty-one or die under that age leaving issue, he gave the estate to the child or children of his daughter *G.* who, either before or after her death, should attain twenty-one, or die under that age leaving issue living at his, her, or their death, in fee as tenants in common. *N.* had no child. At the death of *N.* two children of *G.* had attained the age of twenty-one. Other children attained twenty-one subsequently:—*Held*, that the two children were entitled to the estate. BRACKENBURY *v.* GIBBONS - - 417

CONTRACT—Sale of land—Death of vendor before completion - - - 499
See DEVISE OF TRUST ESTATES.

CONTRIBUTORY—Agent of company—Fiduciary relation - - - - 1
See FIDUCIARY RELATION. 1.

COSTS—Appeal for - - - - 69
See APPEAL FOR COSTS.

—— Lands Clauses Act - - - 360
See COSTS UNDER LANDS CLAUSES ACT.

—— Liquidation—Debtor's solicitor - 320
See COSTS OF LIQUIDATION.

—— Mortgage suit—Disclaimer - - 209
See COSTS IN MORTGAGE SUIT.

—— Order to pay—Appeal—Staying proceedings
See STAYING PROCEEDINGS. 1. [492

—— Refusal to take evidence by affidavit 586
See PROSECUTION OF PENDING PROCEEDINGS. 2.

—— Security for - - 67, 325, 531, 811
See SECURITY FOR COSTS. 1—4.

—— Taxation—Composition with creditors 430
See BANKRUPTCY JURISDICTION.

—— Trustee Acts - - - - 70
See TRUSTEE ACTS. 1.

COSTS IN MORTGAGE SUIT — *Mortgagor and Mortgagee — Puisne Incumbrancer — Disclaimer.*]

COSTS IN MORTGAGE SUIT—*continued.*
Foreclosure bill against mortgagor and second mortgagee. After bill filed the second mortgagee stated that he had been paid off and offered to disclaim at Plaintiff's cost. This was refused, and the second mortgagee filed a disclaimer:—*Held*, that he was entitled to his costs. DAY *v.* GUDGEN - - - - - 209

COSTS OF ATTACHMENT—*Practice—Discretion of Court—Rules of Court*, 1875, *Order* XLIV., *r.* 2; *Order* LV., *r.* 1.] The costs of an attachment are no longer fixed, but by Order LV., rule 1, they are in the discretion of the Court, and should be disposed of at the time of the application for the writ under Order XLIV., rule 2. ABUD *v.* RICHES [526

COSTS OF LIQUIDATION—*Liquidation—Costs of Debtor's Solicitor—Petition filed by one of two Partners—The other Partner an Infant—Joint Estate administered by Consent—Bankruptcy Rules*, 1870, *rr.* 31, 113, 291.] Of two partners one was an infant. The adult partner filed a liquidation petition. He had no separate estate. By consent the joint estate was administered by the trustee appointed under the petition:—*Held*, that the costs of the debtor's solicitor up to the date of the appointment of the trustee ought to be paid out of the joint estate. *In re* MEW. *Ex parte* PEARCE - - - - - - 320

COSTS UNDER LANDS CLAUSES ACT—*Practice—Railway Companies—Amalgamation—Payment out of Court—Costs—Apportionment.*] Portions of the same estate were taken by four different companies, three of which were afterwards amalgamated:—*Held*, that the costs of a petition for payment out of the purchase-moneys must be borne by the subsisting companies equally.—*In re Maryport Railway Act* (32 Beav. 397) not followed. *In re* MANCHESTER AND LEEDS RAILWAY COMPANY. *Ex parte* GASKELL - 360

COUNTER-CLAIM — *Practice — Judicature Act*, 1873, *s.* 24, *sub-s.* 3—*Rules of Court*, 1875, *Order* XVI., *rr.* 17, 18, 19—*Mortgagor, Mortgagee, and Sub-Mortgagees—Notice to and Service on co-Defendants.*] Where a question arises as to the rights of mortgagees and sub-mortgagees who are co-Defendants, the proper course to pursue is to raise it by counter-claim, and to deliver it to the co-Defendants.—In the *Judicature Act*, 1873, s. 24, sub-s. 3, and Rules of Court, 1875, Order XVI., rules 17, 18, and 19, "notice" is applicable to third parties, and not to co-Defendants. SHEPHARD *v.* BEANE - - - - - - 223

2. —— *Judicature Act*, 1873, *s.* 24, *sub-s.* 3—*Rules of Court*, 1875, *Order* XVII., *rr.* 5, 8; *Order* XVI., *rr.* 17, 18; *Order* XIX., *r.* 3; *Order* XXII., *r.* 9.] A Defendant must not bring a third party before the Court as Defendant to a counter-claim against the Plaintiff unless the relief to be obtained against him relates specifically to or is connected with the subject-matter of the action. —The Plaintiff, the trustee of a settlement, by his statement of claim, pleaded that the Defendant, a *cestui que trust* of the settlement, had, by deed, covenanted to indemnify him against an innocent breach of trust in consequence whereof he had been compelled to bring £10,000 into the settlement, and had incurred costs; and he claimed £11,000. — The Defendant delivered a defence and two counter-claims, making the Plaintiff and *A. B.* Defendants to the counter-claims. By the defence he denied that any claim had been made upon or loss sustained by the Plaintiff, and he impeached the validity of the deed of covenant. By his first counter-claim, he stated that the Plaintiff and *A. B.* were the executors of the will of his father, who had joined in the covenant, and had also given to him a covenant of counter-indemnity, and he claimed that the Plaintiff must be held to have admitted assets, and to have retained the amount of his claim out of his testator's estate, or otherwise that such estate might be administered for the purpose. By the second counter-claim, he stated that his father had appointed £10,000 to *A. B.* on a secret trust to satisfy the liability as to the £10,000, and he claimed performance of this trust accordingly:—*Held*, upon motion on behalf of the Plaintiff under Order XXII., rule 9, of the Rules of Court, 1875, that both counter-claims must be excluded as not being sufficiently connected with the original subject-matter of the action, and, as calculated unduly to embarrass and delay the Plaintiff. PADWICK *v.* SCOTT. *In re* SCOTT'S ESTATE. SCOTT *v.* PADWICK - - - - - - 736

COVENANT—To give portions by will—Satisfaction - - - - - 398
See PORTIONS.

—— To renew—Lease to two—Bankruptcy of one
See RENEWAL OF LEASE. [310

—— To settle after-acquired property 363, 706
See COVENANT TO SETTLE. 1, 2.

COVENANT TO SETTLE—*Marriage Settlement—After-acquired Property—Vested Reversionary Interest.*] By a marriage settlement the intended husband and wife severally covenanted with the trustees that all the real and personal property (if any) not thereinbefore settled, to which the wife, or the husband in her right, "shall at any time or times during the said intended coverture become beneficially entitled in possession or reversion, or in any manner whatever, derivable directly or indirectly from "*J.*, should be settled as therein mentioned. At the date of the settlement and of the marriage the wife was entitled to a fund bequeathed by *J.*, subject to the life interest of a person who outlived the wife:—*Held*, that the fund was not subject to the covenant.—*In re Viant's Settlement Trusts* (Law Rep. 18 Eq. 436) not followed. *In re* JONES' WILL - - - 362

2. —— *Marriage Settlement—After-acquired Property—Contingent Interest—Inclusion of Existing as well as Future Property.*] By a post-nuptial settlement a husband covenanted to settle any property to which the wife, or he in her right, either then was or at any time during the coverture should become entitled to:—*Held*, that a contingent interest in a fund standing in Court to the credit of a cause, which fell into possession after the termination of the coverture, was bound by the covenant. AGAR *v.* GEORGE - - - 706

CREDITOR—Action by—Administration - 109
See ACTION ON BEHALF OF SEVERAL.

—— Majority of creditors—Composition deed—Staying proceedings - - - 547
See STAYING PROCEEDINGS. 2.

CREDITOR—*continued.*

—— Majority of creditors—Resolution for composition - - - - 323
See Resolution for Composition.

—— Postponement of debt—Amendment of bankruptcy - - - - 424
See Postponed Creditors.

—— Preference of—13 Eliz. c. 5 - - 104
See Fraudulent Conveyance.

—— Secured—Proof - - - - 485
See Creditor holding Security.

—— Voluntary settlement—Bankruptcy - 54
See Voluntary Settlement.

—— Winding-up petition - - - 116
See Winding-up Petition. 1.

CREDITOR HOLDING SECURITY—*Composition—Effect of Debtor's Valuation of Security—Right to receive Composition on Balance due after Realization of Security—Bankruptcy Act,* 1869, (32 & 33 *Vict. c.* 71), *s.* 126—*Bankruptcy Rules,* 1870, *r.* 272.] A secured creditor is in no way bound by a compounding debtor's estimate of the value of his security.—He is entitled to abstain from proving his debt or taking any part in the composition proceedings, and, when he has realized his security, he may claim from the debtor payment of the composition upon the balance which may then remain unsatisfied of the debt.—Decision of *Bacon,* C.J., affirmed. *In re* Bestwick. *Ex parte* Bestwick - - - - - 485

CUSTOM OF STOCK EXCHANGE—*Limited Company—Sale of Shares on Stock Exchange to Jobbers—Infant Transferee—Indemnification of Vendor by Jobbers—Winding-up—Vendor—Contributory—Agreement by Liquidator with Vendor—Effect on Jobber's Liability to indemnify.*] The owner of sixty £100 shares in a company, on each of which £10 had been paid up, sold them on the *Stock Exchange* to jobbers, who furnished the name of a purchaser to whom the shares were transferred, and in whose name they were registered. The company was afterwards ordered to be wound up, when it turned out that the purchaser was an infant at the time of the transfer; and his name was thereupon removed from the list of contributories, and that of the vendor placed thereon. The vendor then filed his bill against the jobbers to compel them to indemnify him against all liability in respect of the shares, and to repay him all calls he might have to pay thereon, with costs. After the Defendants had put in their answer, an agreement was entered into between the Plaintiff and the liquidator for a compromise of the Plaintiff's liability on the shares (amounting to £5400), the terms of which were, in substance, that the Plaintiff should pay the liquidator £2000, transfer the shares to him, and authorize him to use his name in all proceedings against the Defendants, and to retain all moneys recovered therein, which were to be applied in recouping the Plaintiff the £2000, and in satisfying all liability on the shares, in consideration whereof the Plaintiff was, after all proceedings were over, to be released from all liability on the shares without further payment. Upon the hearing of the cause (*Nickalls* v. *Merry,* Law Rep. 7 H. L. 530) having meanwhile been decided in the House of Lords), the Defendants did not dispute their liability to the Plaintiff as

CUSTOM OF STOCK EXCHANGE—*continued.*

vendor of the shares, but they contended that the release comprised in the agreement enured for their benefit, so as to make the £2000 payable thereunder by the Plaintiff the measure of their own liability either to the Plaintiff or to the liquidator:—*Held,* that, the object and spirit of the agreement being to keep up and enforce the liability of the Defendants, they could not set it up without giving effect to all its provisions, and consequently that it did not operate as a release in their favour, or relieve them in any degree from their liability to pay the full amount payable on the shares.—Observations on the authorities, including *James* v. *May* (Law Rep. 6 H. L. 328) and *Kains* v. *Paine* [1874 K. 21]. Heritage *v.* Paine - - - - - - 594

CUSTOM OF TRADE—*General Lien—Packer.*] A packer is entitled to a general lien on the goods of his customer which are in his hands. *In re* Witt. *Ex parte* Shubrook - - - - 489

DAMAGES—Divorce suit—Debt of petitioning creditor - - - - 22
See Petition for Adjudication.

—— Measure of—Officer of company—Misfeasance
See Fiduciary Relation. 1. [1

DAMP—Nuisance - - - - 692
See Noise.

DEATH—Liquidator—Power of survivor - 366
See Liquidator.

—— Presumption of—Mortgagor - - 617
See Limitations, Statute of. 1.

DEBENTURE—*Company—Shareholders' Priority—Imperfect Register—Companies Act,* 1862 (25 & 26 *Vict. c.* 89), *s.* 43.] Where by the articles of association a limited company has power to mortgage all the property of the company, shareholders holding debentures purporting to charge all the property of the company have priority over the general creditors of the company, and their priority is not affected by imperfection in the register of debentures kept by the company.—Order of *Malins,* V.C., affirmed. *In re* General South American Company - - - 337

2. —— *Directors—Register*—25 & 26 *Vict. c.* 89, *s.* 43.] Three directors of a company advanced money to the company and took as security a debenture, giving a general charge on the undertaking. The debenture was registered, but the register contained no description of any property as charged:—*Held,* that the debenture was not valid as against the creditors of the company. *In re* Native Iron Ore Company - - 345

—— Holder of—Suit against company - 115
See Receiver. 1.

DEBT—Debtor's summons—Receiver in Chancery
See Debtor's Summons. 2. [423

—— Due from executor—Bequest of debt—Insufficient fund - - - 420
See Retainer by Executor.

—— Interest on—Duty of tenant for life to keep down - - - - 199
See Adjustment of Accounts.

—— Petition for adjudication—Damages in divorce suit - - - - 22
See Petition for Adjudication.

DEBT—*continued.*

—— Time of contracting—Time of passing Bankruptcy Act, 1861 - - - 9
See DEBTOR'S SUMMONS. 1.

DEBTOR — Action against — Composition with creditors—Taxation of costs - 430
See BANKRUPTCY JURISDICTION.

DEBTOR'S SUMMONS—*Bankruptcy—Passing of Act—Act taking Effect—Partners—Debt—Non-trader—Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134), *ss.* 90, 232—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 118.] A partner not a trader was indebted to the partnership and also to some of the partners separately. By deeds executed by the debtor after the *Bankruptcy Act*, 1861, had received the Royal Assent, but supposed to have been executed before it came into operation, he covenanted to pay to trustees for the other partners a sum fixed upon as principal, and to pay interest thereon, and he gave a mortgage as security. A debtor's summons was issued for the money covenanted to be paid:—*Held*, that the debt was not contracted within the meaning of the 118th section of the *Bankruptcy Act*, 1869, until the execution of the deed of covenant:—*Held*, that the time defined by the words "passing of the *Bankruptcy Act*, 1861," in the same section is the time when the Act of 1861 received the Royal Assent, and not the time when it came into operation; and that, therefore, the non-trader might be adjudicated bankrupt on a debtor's summons issued for payment of the debt so contracted.—Order of *Bacon*, C.J., discharged. *Ex parte* RASHLEIGH. *In re* DALZELL - - 9

2. —— *Debt due to Receiver in Chancery—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 6, 7.] A receiver in Chancery can issue a debtor's summons in respect of a sum due to him in that character.—*Ex parte Muirhead* (2 Ch. D. 22) distinguished. *Ex parte* HARRIS. *In re* LEWIS [423

—— Uncertificated bankrupt - - 806
See SUSPENSION OF BANKRUPTCY.

DECLARATION OF TRUST—Preference of creditors - - - - 104
See FRAUDULENT CONVEYANCE.

DECREE—Inrolment of—Appeal - - 304
See INROLMENT OF DECREE.

DEED—Estoppel by recitals - - - 72
See ESTOPPEL BY DEED.

DEFENDANT—Striking out - - 369
See JOINDER OF PARTIES.

DEMURRER — *Extension of Time — Practice — Time to deliver Defence—Rules of Court*, 1875, *Order XXVIII., r.* 3; *Order XXII., r.* 1.] A Defendant who has obtained an order extending the time within which to "deliver his defence" may demur within such extended time. HODGES *v.* HODGES - - - - - 112

2. —— *Overruled — Answer — Objection—Appeal.*] After a demurrer had been overruled the bill was amended, and the Defendant answered, not taking in his answer the objection which had been raised on the demurrer:—*Held*, that the Defendant might at the hearing take the same objection.—Decree of *Jessel*, M.R., reversed. JOHNASSON *v.* BONHOTE - - - - 298

DEPOSIT—Railway company—Entry on land [201
See COMPENSATION UNDER RAILWAYS CLAUSES ACT. 1.

DEPOSIT BY COMPANY—*Payment out of Deposit—Insolvency and Winding-up—Application of Deposit.*] Where by an Act of Parliament the payment out of the Government deposit paid in by a company, is left to the discretion of the Court upon "the insolvency and winding-up" of the company, it is sufficient that the company is wound up on the ground of insolvency; and where the deposit is ordered to be paid out for the benefit of creditors, the first assets available for debts will be the calls already made, and then the deposit money, but only so much thereof as may be necessary, the rest being forfeited to the Crown. *In re* BRADFORD TRAMWAYS COMPANY - 373

DEPOSITIONS—Special examiner—Certificate
See SPECIAL EXAMINER. [217

DEVISE OF TRUST ESTATES—*Vendor and Purchaser—Contract to sell Real Estate—Death of Vendor before Completion — General Devise of Real Estate upon Trust for Sale.*] In 1874 the Plaintiffs entered into a contract for the purchase of real estate. After the title had been accepted, and before completion, the vendor died, having by his will (dated in 1873) given his personal estate to *E.*, whom he appointed executor, and devised all his real estate to *H.* and *M.* upon trust for sale, and having also devised to *H.* alone all the real estate which at his death might be vested in him as trustee:—*Held*, that the real estate contracted to be purchased by the Plaintiffs passed to *H.* under the devise of trust estates.—*Wall* v. *Bright* (1 Jac. & W. 494) commented on and explained. LYSAGHT *v.* EDWARDS - - - 499

DISCLAIMER—*Liquidation by Arrangement—Lease by Trustee—Notice by Landlord—Extension of Time—Waiver—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 23, 24.] A trustee in liquidation received from the lessors on the 24th of November a notice calling on him to disclaim a lease held by the debtor within twenty-eight days, under the 24th section of the *Bankruptcy Act*, 1869. After some correspondence respecting the property, the lessors wrote a letter to the trustee on the day before the twenty-eight days expired, in which they asked for a reply to their letter of the 24th of November, "at his earliest convenience." The trustee, after the twenty-eight days had expired, applied to the Court for leave to disclaim the lease:—*Held* (affirming the decision of *Bacon*, C.J.), that the lessors had waived their right to insist on an answer within twenty-eight days, and leave to disclaim was given. *Ex parte* MOORE. *In re* STOKOE - - 802

—— Foreclosure suit—Costs - - 209
See COSTS IN MORTGAGE SUIT.

DISCOVERY—Bill of - - - 378
See BILL OF DISCOVERY.

—— Interrogatories - - - - 704
See INTERROGATORIES.

—— Production of documents - 140, 644
See PRODUCTION OF DOCUMENTS. 1, 2.

DISCRETION—Court—Costs of attachment 528
See COSTS OF ATTACHMENT.

DISCRETION—*continued.*
—— Court—Verdict on issues in bankruptcy 72
See Issues in Bankruptcy.
—— Court—Winding-up petition - - 116
See Winding-up Petition. 1.

DISQUALIFICATION—Arbitrator—Corruption
See Misconduct of Arbitrator. [113
—— Patentee—Public officer - - 812
See Specification of Patent.

DISSOLUTION OF MARRIAGE—Marriage settlement - - - - - 318
See Divorced Husband.

DISTRIBUTION—Period of—Gift on attaining twenty-one - - - 753, 783
See Gift on attaining Twenty-one. 1, 2.

DISTRICT REGISTRAR—*Powers of—Action for Administration—Decree on Summons for Administration, by Consent, of Real and Personal Estate by District Registrar—Rules of Court*, 1875, *Order xxxv., r.* 1; *Order xv., r.* 1—*Judicature Act*, 1873, *s.* 66.] In the *Liverpool* District Registry an action was commenced by writ for the administration of real and personal estate, and statements of claim and defence having been filed, the action came on for trial. The District Registrar issued an administration summons, and made, by consent, a decree for administration of the real and personal estate, directing accounts and inquiries, and reserving further directions. The accounts and inquiries having been prosecuted, on application for directions as to setting down the action on further consideration:—*Held*, that the proceedings in the District Registry were irregular, the District Registrar having no power to make a decree, even by consent.—The action coming on for trial as a short cause:—*Held*, that, having regard to Rules of Court, 1875, Order xxxv., rule 1, it is only in default of appearance that a District Registrar can make an order under Order xv., rule 1, and that accounts and inquiries cannot be prosecuted in a District Registry, except by the direction of the Court or the Judge of the Division, under sect. 66 of the *Judicature Act*, 1873.—An application for a decree, with liberty to adopt the proceedings in the District Registry, was refused, but the usual administration decree was made, with a direction that the accounts and inquiries should be taken and made in the District Registry, and that the sale of the real estate should take place in *London* under the supervision of the Judge in Chambers. Irlam *v.* Irlam - - - - - - 608

DIVORCED HUSBAND—*Marriage Settlement—Dissolution of Marriage—Interest of Husband.*] By a marriage settlement the wife's property was settled upon trust for her for life, and after her decease, as to one moiety, in trust as she should appoint, and, in default of appointment, as to real estate for her heirs, and as to personalty for her next of kin; and as to the other moiety, in trust for the husband absolutely. The wife obtained an absolute decree for dissolution of the marriage, and afterwards filed a bill to have the settled property transferred to her:—*Held* (affirming the decision of the Master of the Rolls), that the husband's rights under the settlement were not forfeited by the dissolution of the marriage, and that the bill must be dismissed. Burton *v.* Sturgeon [318

DOCUMENTS—Production of - - 140, 644
See Production of Documents. 1, 2.

DOUBLE PORTIONS—Covenant to give portions by will—Inconsistent limitations - 398
See Portions.

DRAINING—Settled estate—Expense of - 185
See Management by Trustees.

ECCLESIASTICAL CHARITY—Religious opinions of trustees - - - - 554
See Charity Scheme.

EJUSDEM GENERIS—Words in residuary gift
See Residuary Gift. 1. [122

ESTATE TAIL—Rule in *Wild's Case* - 494
See Rule in Wild's Case.

ESTOPPEL BY DEED—*Recitals.*] Recitals in a deed do not operate as an estoppel against a party to the deed in an action not founded on the deed, but collateral to it. *Ex parte* Morgan. *In re* Simpson - - - - - - 72

EVIDENCE—Adding to—Old practice - 127
See Prosecution of pending Proceedings. 1.
—— Insufficient—Execution of security - 127
See Fraudulent Preference.
—— Pending proceedings—Affidavits - 586
See Prosecution of pending Proceedings. 2.
—— Special examiner—Taking down depositions - - - - - - 217
See Special Examiner.
—— Witness—Compulsory attendance - 575
See Witness in Winding-up.

EX PARTE ORDER—Prosecution of bankrupt [786, 799
See Prosecution of Bankrupt. 1, 2.

EXECUTOR—Right of retainer - - 420
See Retainer by Executor.

EXECUTORY DEVISE - - - 417
See Contingent Remainder.

EXECUTORY SETTLEMENT—*Settlement in Pursuance of Articles—Limitations to Children.*] Ante-nuptial articles were signed which provided for the wife's personal estate being vested in trustees, "the trusts of the income being for the benefit of the said [husband and wife] during their lives, and the trusts of the capital being for and amongst the children according to the appointment of the said [husband and wife], or the survivor of them; and in default of appointment, to the children equally; and in the event of there being no children, and of the said [husband] being the survivor, the trust property to be at his absolute disposal." After the marriage a settlement was executed which limited the income to the husband and wife during their joint lives, and to the survivor of them during his or her life, and then gave the capital to the children absolutely as tenants in common; but if there was no child, and the husband survived the wife, then to the husband. There was only one child of the marriage, and he died at the age of six months, in

EXECUTORY SETTLEMENT—*continued.*
the lifetime of the parents. The husband died in the lifetime of the wife:—*Held* (affirming the decision of *Bacon*, V.C.), that the capital of the fund and the arrears of income at the death of the husband belonged to the wife, for that the Court would have carried the articles into effect by giving the wife the first life estate to her separate use, and by making the shares of sons contingent on their attaining twenty-one, and of daughters on their attaining twenty-one or marrying, or by inserting clauses of survivorship and accruer on the death of sons under twenty-one and of daughters under that age and unmarried, so that the husband would have had no title as next of kin of his deceased infant child, and that the settlement must be rectified accordingly. COGAN *v.* DUFFIELD - - - - - - 44

FIDUCIARY RELATION—*Companies Act*, 1862, *s.* 165—*Misfeasance—Officer of Company—Benefit to Agent—Amount of Damages—Contributories.*] The owner of a mine, by an agreement adopted by a company, agreed with *M.*, acting on behalf of the company, to sell the mine to the company for a price partly in cash and partly in paid-up shares. By another agreement not known to the company, the vendor was to give to *M.* for his trouble 600 of the paid-up shares. The company was formed, and whilst *M.* was secretary to the company the shares were allotted to the vendor, and transfers of 600 of them by the vendor to *M.* were prepared. The 600 shares were afterwards transferred to *M.*, and 500 of them remained in his name when the company was ordered to be wound up:—*Held*, that *M.* had been guilty of misfeasance in relation to the company, and could, under sect. 165 of the *Companies Act*, 1862, be made to contribute in respect of such misfeasance:—*Held*, that the measure of the damages to be contributed by *M.* was the highest value of the shares transferred to him, and that as some of the shares had been allotted to solvent shareholders, the value must be taken to be the amount unpaid on the shares.—*Quære*, whether *M.* could be made a contributory in respect of these shares, as shares on which nothing had been paid. *In re* MORVAH CONSOLS TIN MINING COMPANY. MCKAY'S CASE 1

2. —— *Trustee and Cestui que Trust—Sale of Estate by Trustee—Purchase by the Trustees of the Selling Trustee's Settlement.*] *H.*, a devisee in trust for sale under a will, was interested in the proceeds of sale under his marriage settlement, under which the trustees had power to purchase a residence for him and his wife. Part of the estate devised for sale consisted of a dwelling-house, which *H.* and his wife requested their trustees to buy as a residence for them. The trustees accordingly authorized *H.* to buy in their names. *H.* instructed an agent to bid for the house in the name of his trustees up to £8000. He also, as vendor, instructed the auctioneer to fix the reserve bidding, which he did at £6000, *H.* not having informed him that his trustees were prepared to bid up to £8000. The house was bought for the trustees for £7230.—On bill by *cestuis que trust* under the will, who were infants, to have it ascertained whether the sale was for their benefit, and for that purpose to have the property put up for

FIDUCIARY RELATION—*continued.*
sale again at an upset price:—*Held*, that the conduct of *H.* had been regular and legal in all respects; and that the sale could not be set aside; and bill dismissed. HICKLEY *v.* HICKLEY. SAME *v.* SAME - - - - - - 190

FORECLOSURE—Disclaimer - - 209
See COSTS IN MORTGAGE SUIT.

—— Suit against mining company manager 115
See RECEIVER. 1.

FOREIGN SHAREHOLDER—Opposing winding-up petition - - - - 531
See SECURITY FOR COSTS. 4.

FORFEITURE—Lease—Distinguished from surrender—Underlessee - - 235
See SURRENDER OF LEASE.

FORM OF SETTLEMENT—Articles—Limitations to children - - - - - 44
See EXECUTORY SETTLEMENT.

FRAUD—Misrepresentation in prospectus 621, 663
See MISREPRESENTATION IN PROSPECTUS. 1, 2.

—— Trade-mark - - - - - 434
See TRADE-MARK.

FRAUDULENT CONVEYANCE—*Administration—Insolvent Estate—Preference of Creditors—Declaration of Trust—Non-communication to Cestui que Trust*—13 *Eliz. c.* 5.] The creditor of an insolvent debtor, who dies without having been adjudicated bankrupt, is entitled to the benefit of any payment or security made or given by the debtor, although such payment or security would in case of bankruptcy have been set aside as a fraudulent preference. *E.* placed in the hands of her solicitor a sum of money for investment. He died insolvent without investing the money, and after his death there was found in the safe at his office a memorandum dated a fortnight before his death, the contents of which had not been communicated to *E.* By this memorandum, the solicitor declared himself trustee of certain leaseholds then in mortgage to himself, and of a bill which he had indorsed to *E.*, to secure the repayment of the sum placed in his hands. In a creditor's suit for the administration of the solicitor's estate:—*Held*, that, even if the solicitor executed the memorandum with the knowledge of his insolvency, still *E.* was entitled to the benefit of the security as against the other creditors; for, as the solicitor retained no benefit for himself, the gift was *bonâ fide* within 13 Eliz. c. 5. MIDDLETON *v.* POLLOCK. *Ex parte* ELLIOTT - - - - - 104

FRAUDULENT PREFERENCE—*Bankruptcy—Knowledge of Insolvent Circumstances—Negotiation for and Promise of Security—Imperfect Evidence as to date of Execution of Security.*] A solicitor, shortly before absconding as an insolvent debtor, had given securities to the Defendant, who was one of his clerks, and who the Court was satisfied on the evidence was a *bonâ fide* creditor. The bankrupt left on the 28th of October, 1872, having two days previously signed a declaration admitting his inability to pay his debts. The securities bore date the 30th of September; but they were not executed till after that day. The deeds were engrossed in the office of the bankrupt on the 10th of October; and were executed on the

FRAUDULENT PREFERENCE—*continued.*
14th of October. They were not stamped till after the bankrupt absconded. The Defendant had been pressing for security during August and September, and it had been promised; and the drafts of the securities were prepared in September:—*Held*, on a suit by the trustee in bankruptcy to set aside the securities as being a fraudulent preference, that the pressure and promise of security were sufficient to rebut the presumption of a fraudulent preference arising from the circumstances, and would sustain the deeds even if the knowledge of the insolvency were brought home to the Defendant. Smith *v.* Pilgrim - 127
—— Distinguished from fraudulent conveyance under 13 Eliz. c. 5 - - -
See Fradulent Conveyance.

FRAUDULENT DEBTOR—Prosecution of 786, 799
See Prosecution of Bankrupt. 1, 2.

FRESH ADVANCE—Assignment of all debtor's property - - - - 256
See Assignment of all Debtor's Property.

GENERAL RULES IN BANKRUPTCY, 1870, rr. 31, 113, 291 - - - - 320
See Costs of Liquidation.
—— rr. 121, 243, 246, 247 - - - 749
See Trustee in Bankruptcy.
—— r. 143 - - - - - 749
See Rehearing in Bankruptcy.
—— rr. 205, 301 - - - - 326
See Resolution for Liquidation. 2.
—— rr. 260, 279 - - - - 63
See Injunction in Bankruptcy.
—— r. 266, 295 - - - - 231
See Resolution for Liquidation. 1.
—— r. 272 - - - - - 485
See Creditor holding Security.
—— rr. 285, 307, 308 - - - 172
See Joint and Separate Estates.
—— r. 295 - - - - - 323
See Resolution for Composition.

GIFT BY IMPLICATION—*Will—Children of Daughter.*] A testator gave to his sons *H.* and *J.* £16,000 upon special trust and confidence to invest and to pay the income of £8000, part thereof, to his daughter *A.* for life for her separate use, and after her death to divide the £8000 amongst her children at twenty-one years of age. He then directed that *H.* and *J.* should pay the income of the remaining £8000 to his daughter *S.* for life in the same manner in every respect and subject to the same control as he had directed as to his daughter *A.*, it being his intention that his said daughters' fortunes should not be subject to the debts of their husbands. He then gave to *H.* and *J.* a sum of £6000, to invest and pay the income to his son *S.*, and to divide the principal amongst his children. The sums were charged on real estate. There was power to apply the income for the maintenance and education of the daughters' and sons' children. The daughter *S.* died, leaving four children who had attained the age of twenty-one. The fund representing the £8000 had been paid into Court:—
GIFT BY IMPLICATION—*continued.*
Held, that by implication the four children were entitled to the fund. Sweeting *v.* Prideaux 413

GIFT ON ATTAINING TWENTY-ONE—*Will—Gift to Class in Remainder—Period of Distribution—Ascertainment of Class—Marriage with Consent of Parents—Impossible Condition.*] A testator bequeathed a fund to trustees upon trust, after the determination of a life interest, to pay and transfer the trust property equally among the female children of his sister on their attaining twenty-one or marrying with the consent of their parents. At the death of the tenant for life the testator's sister was a widow and had two daughters, the elder of whom afterwards married while under age, with the consent of her mother:—*Held*, that the class to take must be ascertained when the first member became absolutely entitled to a share:—*Held* (reversing the decision of the Master of the Rolls), that the consent mentioned in the will must be taken to be that of the parents or parent if any, and that the daughter who had married with the consent of her surviving parent took a vested interest in the fund. Dawson *v.* Oliver-Massey - - - 753

2. ——*Will—Vesting—Period for ascertaining Class.*] A testator directed his trustees to pay the income of his real and residuary personal estate to his wife for life, and on her death to apply the income in the maintenance of his children then living and the issue of his children then deceased (such issue taking the share which their parents would have taken if living) until his youngest surviving child attained twenty-one, and when such child attained twenty-one, to sell the real estate and hold the proceeds and the personal estate in trust for his children then living and the issue then living of his child or children dying before that period. The youngest child attained twenty-one twelve years before the widow's death:—*Held*, (affirming the decision of the Master of the Rolls), that the class was not to be ascertained before the death of the widow, and that the legal personal representatives of a child who had died without issue in her lifetime took nothing.—Where the effect of postponing the vesting of the shares of children to the period of division would be to leave the family of a child dying before that period without provision, the Court leans strongly in favour of early vesting; but where a testator provides for all his issue living at the period of division, his words will not be strained in order to make the shares vest at an earlier period. *In re* W. S. Deighton's Settled Estates - 783

GLEBE LAND—Purchase-money under Lands Clauses Act—Reinvestment - 225
See Reinvestment of Purchase-money. 1.

GUARDIAN—*Chancery Division—Jurisdiction—Person of Unsound Mind not so found—Guardianship and Maintenance.*] The Chancery Division has jurisdiction to give directions as to the guardianship and maintenance of a person of unsound mind not so found, but will not exercise it unless the property is small and proceedings are not intended to be taken in Lunacy. Vane *v.* Vane - - - - - 124
—— Power to consent under Places of Worship Sites Act - - - - 29
See Places of Worship Sites Act.

HEIRLOOMS — *Jurisdiction — Sale apart from Land—Tenant for Life and Remainderman.*] The Court has jurisdiction to order a sale of heirlooms apart from the land to which they are attached for the purpose of paying off mortgages, and will do so at the instance of a tenant for life where satisfied that it will be for the benefit of the parties interested that they should be sold, even where they are infant tenants in tail in remainder. FANE *v.* FANE - - - - - - 711

HUSBAND AND WIFE—Covenant to settle 706
See COVENANT TO SETTLE. 2.

—— Death at same time—Funds settled on survivor - - - - 213
See PRESUMPTION OF DEATH.

—— Divorced husband—Interest under marriage settlement - - - - 318
See DIVORCED HUSBAND.

—— Infant's settlement - - - 387
See INFANT'S SETTLEMENT.

—— Married Women's Property Act - 266
See MARRIED WOMEN'S PROPERTY ACT.

—— Settlement in pursuance of articles - 44
See EXECUTORY SETTLEMENT.

ILLEGAL ASSOCIATION—Unregistered company —Winding-up - - - 763
See WINDING-UP PETITION. 3.

IMPLICATION—Gift by - - - 413
See GIFT BY IMPLICATION.

IMPOSSIBLE CONDITION—Marriage with consent of parents - - - 753
See GIFT ON ATTAINING TWENTY-ONE. 1.

INDEMNITY—Sale of shares—Jobber—Infant
See CUSTOM OF STOCK EXCHANGE. [594

INDIA—Property in—Bill of discovery as to 378
See BILL OF DISCOVERY.

INFANT—Lease under 1 Will. 4, c. 65 - 719
See LEASE UNDER 1 WILL. 4, C. 65.

—— Subscriber of memorandum - - 610
See WINDING-UP PETITION. 2.

—— Trade debt—Act of bankruptcy - 227
See INFANT TRADER.

—— Transfer of shares—Liability of jobber 594
See CUSTOM OF STOCK EXCHANGE.

INFANT TRADER—*Adjudication of Bankruptcy —Trade Debt—Infants' Relief Act*, 1874 (37 & 38 *Vict. c.* 62).] Notwithstanding the provisions of the *Infants' Relief Act*, 1874, a debtor who has traded while under age can, after he has attained full age, be adjudicated a bankrupt in respect of a trade debt contracted, and upon an act of bankruptcy committed, during his infancy.—*Ex parte Kibble* (Law Rep. 10 Ch. 373) distinguished. *Ex parte* LYNCH. *In re* LYNCH - - - 227

INFANT'S SETTLEMENT—*Marriage Settlement—Minority of Wife—Reversionary Interests of Wife —Confirmation by Widow, and by second Husband.*] By an ante-nuptial settlement, it was witnessed that the intended husband and the intended wife (who was a minor) would, as soon after the marriage as the case would admit, convey to the trustees certain funds to which the intended wife was, contingently on her attaining twenty-one or marriage, entitled in reversion expectant on the death of her mother; and that the intended husband should bring certain property into settlement.—The husband died, leaving a son. After the husband's death, in a suit relating to part of the property agreed to be settled by him, in which the widow, as administratrix, was a defendant, a decree was made by consent of all parties by which part of the property was ordered to be paid to the trustees:—*Held*, that this amounted to a confirmation by the widow of the settlement.—The widow married again; and during the second coverture the reversionary funds fell into possession, whereupon a petition was presented by the second husband and his wife, as they alleged, in ignorance of the effect of their so doing, praying that the wife's funds might be carried over to an account intituled the Account of the Settlement made on the first marriage; and upon the petition an order was made as prayed.—On suit by the second husband to have the settlement declared void against him and the children of the second marriage:—*Held*, that the presentation of the petition, followed by the order of the Court, amounted to a confirmation by the second husband of the settlement, and bill dismissed, but without costs. WHITE *v.* COX 387

INJUNCTION—Arbitrator—Corruption - 113
See MISCONDUCT OF ARBITRATOR.

—— Bankruptcy Court - - - 63
See INJUNCTION IN BANKRUPTCY.

—— Light and air - - - - 165
See LIGHT AND AIR.

—— Nuisance—Noise - - - 692
See NOISE.

—— Relief against third party - - 51
See CITATION OF THIRD PARTY. 1.

—— Trade-mark - - - - 434
See TRADE-MARK.

INJUNCTION IN BANKRUPTCY—*Composition—Failure to pay—Action by Creditor—Injunction—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 126 —*Bankruptcy Rules*, 1870, *rr.* 260, 279.] The creditors of debtors who had filed a liquidation petition resolved to accept a composition, and appointed a trustee to receive and distribute it. In the debtor's statement it was mentioned that two persons claimed to be creditors for a large sum, but that their claim was the subject of an action, which had been referred to an arbitrator, the reference being still pending. These persons attended the meetings of the creditors (of which notice had been sent to them), and tendered a proof, but their proof was objected to, and they were not allowed to vote. Several months afterwards the arbitrator made his award, finding a large sum due to them. The composition not having been paid or tendered to them, they commenced an action against the debtors for the amount of the award:—*Held*, that the action ought not to be restrained.—*Ex parte Paper Staining Company* (Law Rep. 8 Ch. 595) followed. *Ex parte* WATSON. *In re* WATSON - - 63

INROLMENT OF DECREE—*Appeal.*] Under the Judicature Acts the inrolment of a decree has no effect in preventing an appeal. HASTIE *v.* HASTIE [304

INSPECTION OF DOCUMENTS—*India*—Improper tribunal - - - - 378
See BILL OF DISCOVERY.

INSUFFICIENCY OF CAPITAL—Company 663
See MISREPRESENTATION IN PROSPECTUS. 2.

INSURANCE COMPANY—Marshalling assets 476
See MARSHALLING.

INTEREST—Arrears of - - - 713
See LIMITATIONS, STATUTE OF. 2.
—— Keeping down—Tenant for life - 199
See ADJUSTMENT OF ACCOUNTS.
—— Trustee in liquidation - - - 57
See TRUSTEE IN LIQUIDATION.

INTERROGATORIES—*Practice—Discovery—Examination of Plaintiff—Rules of Court*, 1875, *Order* XXXI., *r.* 1.] An action was brought against the executors of a deceased trustee seeking to make his estate liable for breaches of trust. The executors were personally ignorant of all the transactions in respect of which the Plaintiff sought relief, and applied for leave to interrogate the Plaintiff before putting in the statement of defence, alleging that the Plaintiff's solicitor (who was partner in a firm of solicitors who had acted for the trustees during the trusteeship of the testator) could furnish information which would enable them to defend the action successfully:—*Held*, that leave must be refused, and that the executors must put in such statement of defence as they could, and then interrogate. DISNEY *v.* LONGBOURNE - - - 704

INVOICE PRICE—Appropriation of consignments [278
See SECURITIES FOR BILLS OF EXCHANGE.

IRREGULARITY—Order for trial by jury—Waiver - - - - 72
See ISSUES IN BANKRUPTCY.

ISSUES IN BANKRUPTCY—*Court of Bankruptcy—Question of Fact—Trial by Jury—Power to set aside or disregard Verdict—Judicial Discretion as to Trial by Jury—Irregularity—Waiver—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 59, 65, 66, 71, 72.] When a question of fact has been tried by a jury in the Court of Bankruptcy the Court cannot set aside or disregard the verdict, unless either there was no evidence to go to the jury, or, by reason of some matter of law or of some new fact, the verdict has become immaterial to the decision of the case.—If there was any evidence to go to the jury, and the verdict is, in the opinion of the Court, against the weight of the evidence, the proper course to get rid of the verdict is to order a new trial.—*Ex parte Norton* (Law Rep. 16 Eq. 397) questioned.—Under sect. 72 of the *Bankruptcy Act*, 1869, the Judge must exercise a judicial discretion whether a question of fact should be tried by a jury. One party is not entitled as of right to demand a jury.—An order for the trial of a question of fact by a jury was made upon the demand of one party only:—*Held*, that the order was only irregular, that the irregularity could be waived, and that it had been waived by both the parties appearing on the trial without taking the objection. *Ex parte* MORGAN. *In re* SIMPSON - - - - - 72

JOBBER—Stock Exchange—Indemnity - 594
See CUSTOM OF STOCK EXCHANGE.

JOINDER OF CAUSES OF ACTION—*Practice—Action for Recovery of Land—Rules of Court*, 1875, *Order* XVII., *r.* 2.] Leave will be given under Rules of Court, 1875, Order XVII., rule 2, to join with an action for the recovery of land an action for the recovery or delivery up of a deed relating to the land: also for the recovery of personal estate comprised in the same instrument. COOK *v.* ENCHMARCH - - - - 111

JOINDER OF PARTIES—*Judicature Act—Rules of Court*, 1875, *Order* XVI., *rr.* 13, 14—*Defendants struck out of an Action.*] Where the Court is of opinion that a Defendant is an improper party to an action, it will order the name of such Defendant to be struck out of the record before the hearing, under Order XVI., rule 13, of the Rules of Court, 1875, notwithstanding he may have filed his statement of defence. VALLANCE *v.* BIRMINGHAM AND MIDLAND LAND AND INVESTMENT CORPORATION - - - - - 369

JOINT AND SEPARATE ESTATES—*Vendor and Purchaser—Liquidation Debtor—Resignation of Trustee—Contract by Continuing Trustee for Sale of Realty, part of one of the Separate Estates—Bankruptcy Act*, 1869, *s.* 83, *sub-ss.* 2, 8—*Bankruptcy Rules*, 1870, *rr.* 285, 307, 308.] Upon a liquidation petition by two partners, two persons were by three several resolutions appointed trustees of the joint estate, and of the two separate estates, respectively. One of the trustees resigned, whereupon the continuing trustee was by a resolution of the joint creditors appointed "sole trustee of the property of the debtors;" but no resolution was passed appointing any one to be trustee of either of the separate estates:—*Held*, that the continuing trustee was able to convey real property, part of one of the separate estates, to a purchaser, for all the interest of the debtor at the commencement of the liquidation. *In re* WADDELL'S CONTRACT - - - - - - 172

JUDGMENT—Motion for - - - 686
See MOTION FOR JUDGMENT.

JURISDICTION—Bankruptcy or Chancery—Staying proceedings - - - 547
See STAYING PROCEEDINGS. 2.
—— Bill of discovery—Property in *India* 378
See BILL OF DISCOVERY.
—— Chancery Division—Guardian of person of unsound mind - - - 124
See GUARDIAN.
—— Heirlooms—Sale - - - 711
See HEIRLOOMS.
—— Injunction against arbitrator—Corruption
See MISCONDUCT OF ARBITRATOR. [113
—— Receiver and manager—Foreclosure suit
See RECEIVER. 1. [115
—— Relief against third party - - 51
See CITATION OF THIRD PARTY. 1.
—— Settled Estates Act—Construction of road
See SETTLED ESTATES ACT. [522

JURY—Trial by - - - 740
See TRIAL BY JURY.

LAND—Petition for sale of - - - 409
See PETITION FOR SALE.

LEASE—Disclaimer of—Bankruptcy - 802
See DISCLAIMER.
—— Renewal of - - - - 310
See RENEWAL OF LEASE.
—— Surrender—Underlessee - - 235
See SURRENDER OF LEASE.
—— Under 1 Will. 4, c. 65 - - - 719
See LEASE UNDER 1 WILL. 4. C. 65.

LEASE UNDER 1 WILL. 4, c. 65—*Infant entitled to Real Estate—Power of Leasing—Intervening Tenancy by the Curtesy—Estate indefeasibly vested.*] The Court has power, under 11 Geo. 4 & 1 Will. 4, c. 65, to sanction a building lease of an infant's freehold estate when he is seised in fee simple in reversion after a life estate by the curtesy vested in his father. *In re* LETCHFORD - - 719

LEGACY CHARGED ON LAND—*Will—Condition.*] The testator, by will, gave to each of his younger sons £1000, "which I charge on my estate at *A.* hereinafter devised to my eldest son, but I direct that the sum shall not be raisable or paid to them respectively until my eldest son shall come into actual possession of the *M.* estate."—The *M.* estate was settled on *F.* for life, remainder to the eldest son of the testator for life, remainder to his issue in tail male.—The eldest son died before *F.*, and without coming into possession of the *M.* estate:—*Held*, that the legacies to younger sons were wholly contingent upon the eldest son becoming owner of the *M.* estate; and that as that event had not happened they failed and sank into the residue. TAYLOR *v.* LAMBERT - - 177

LIABILITY—Policy of life insurance—Limitations - - - - 476
See MARSHALLING.
LIBRARY—Public Health Act - - 634
See ORNAMENTAL GARDEN.
LIEN—Packer - - - - 489
See CUSTOM OF TRADE.
—— Unsettled property—Agreement for settlement - - - - - 304
See AGREEMENT FOR SETTLEMENT.

LIGHT AND AIR—*Ancient Lights—Injunction—Angle of 45°—Metropolis Local Management Acts Amendment Act* (25 & 26 *Vict. c.* 102), *s.* 85.] An ancient light of the Plaintiff, a sculptor, had a north aspect, in a street thirty-one feet wide. Defendants' buildings on the opposite side of the street were, as to part, exactly thirty-one feet high, and as to the other part, a little less than that height. They claimed to have a statutory right to raise their buildings to a height which would subtend an angle of 45° measured from a base line level with the centre of the Plaintiff's light:—*Held*, that the statutory regulation as to the height of buildings in streets is not to be taken as limiting the right by prescription to ancient lights, but that such right depends upon the degree and amount of obscuration in each particular case.—*Hackett* v. *Baiss* (Law Rep. 20 Eq. 494) explained. THEED *v.* DEBENHAM - - - - 165

LIMITATIONS, STATUTE OF—*Mortgagee in Possession under Order of Court—Death of Tenant for Life and Mortgagor, Presumption of—Liability of Mortgagee to account for Rents received from the date of presumed Death—Statutes of Limitation*, 21 *Jac.* 1, *c.* 16; 3 & 4 *Will.* 4, *c.* 27, *s.* 42.] In 1859 a suit for, *inter alia*, administration was instituted by a tenant for life, under the will of the testator, of certain leaseholds, and who subsequently to the suit mortgaged her life interest. The mortgagee had, under an order made in November, 1860, liberty to and did enter into possession of the rents for the purpose of keeping down his interest and paying the balance to the tenant for life. In March, 1866, the mortgagor left her home and was never heard of afterwards. On a petition presented in 1875 by the parties entitled in remainder, it was *held* that the presumption was that the mortgagor died soon after June, 1866.—On a petition now presented by the same parties:—*Held*, that the mortgagee, having entered into possession under the order of the Court, did not become a trespasser by the death of the mortgagor; that the Statutes of Limitation, 21 Jac. 1, c. 16, and 3 & 4 Will. 4, c. 27, s. 42, did not apply; and that the mortgagee must account for the rents received from July, 1866. HICKMAN *v.* UPSALL 617

2. —— *Equitable Mortgage—Arrears of Interest—3 & 4 Will. 4, c. 27, s. 42; 3 & 4 Will. 4, c. 42, s. 3—Tacking—Money in Court under the Lands Clauses Consolidation Act.*] Money paid into Court under the *Lands Clauses Act* for purchase of land which was subject to an equitable mortgage by deposit, with a memorandum undertaking to give a legal mortgage; on petition by the mortgagee for payment out:—*Held*, that the analogy of the Statutes of Limitation applied, and that only six years' arrears of interest could be charged.—*Edmunds* v. *Waugh* (Law Rep. 1 Eq. 418) explained. *In re* STEAD'S MORTGAGED ESTATES - - - - - 713

LIMITATIONS TO CHILDREN - - 44
See EXECUTORY SETTLEMENT.
LIQUIDATION BY ARRANGEMENT—Costs 320
See COSTS OF LIQUIDATION.
—— Disclaimer - - - - 802
See DISCLAIMER.
—— Joint and separate estates - - 172
See JOINT AND SEPARATE ESTATES.
—— Resolution for - - - 231, 326
See RESOLUTION FOR LIQUIDATION. 1, 2.
—— Subsequent to annulled bankruptcy - 424
See POSTPONED CREDITORS.
—— Trustee—Interest - - - 57
See TRUSTEE IN LIQUIDATION.

LIQUIDATOR—*Company—Voluntary Winding-up—Joint Liquidators—Death of Liquidator—Conveyance of Company's Property—Power of Surviving Liquidator—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 133, *sub-s.* 6.] Where two liquidators are appointed for the purpose of carrying into effect a resolution to wind up a company voluntarily, one of them cannot (unless directions to the contrary are given by the resolutions) use the seal of the company even for the purpose of carrying into effect an agreement made by both liquidators, and the validity of which is undisputed.—A company resolved to wind up voluntarily, and appointed two liquidators, who entered into a valid agreement for the sale of the assets of the company. Part of such assets consisted of a debt secured by a legal mortgage, and a proper legal assignment of the mortgage security was prepared; but one of the liquidators died before the seal of

LIQUIDATOR—*continued.*
the company was affixed to it:—*Held*, that the surviving liquidator had no power to affix the seal of the company, and that a new liquidator must be appointed in order that the assignment might be executed. *In re* Metropolitan Bank and Jones - - - - - - 366
—— Agreement with vendor of shares—Jobber
See Custom of Stock Exchange. [594

LUNACY—Person of unsound mind - 124
See Guardian.
—— Purchase-money—Lands Clauses Act—Re-investment - - - - 690
See Reinvestment of Purchase-money. 2.
—— Tenant in tail - - - - 61
See Lunatic Tenant in Tail.
—— Trustee—Appointment under Trustee Act
See Trustee Acts. 1. [70

LUNATIC TENANT IN TAIL—*Mortgage to raise prior Charge—Form of Mortgage Deed—Right of Remainderman—Mortgage for Term of Years—Fines and Recoveries Act* (3 & 4 *Will.* 4, *c.* 74), *s.* 21—*Lunacy Regulation Act*, 1853 (16 & 17 *Vict. c.* 70), *s.* 116.] A lunatic was tenant in tail of an estate, subject to a charge for portions. In a suit in the Court of Chancery a decree had been made ordering the charge to be raised by a sale or mortgage of the estate. On a petition by the committee, asking that he might execute a disentailing deed on behalf of the lunatic for the purpose of raising the charge by a mortgage:—*Held*, that the interest of the remainderman ought not to be barred further than was necessary, and that the mortgage should be made for a term of years, and without a power of sale. *In re* Pares - 61

MAINTENANCE—Person of unsound mind 124
See Guardian.
MAJORITY OF CREDITORS—Composition deed
See Staying Proceedings. 2. [547
—— Resolution for composition—Power to bind minority - - - - 323
See Resolution for Composition.

MANAGEMENT BY TRUSTEES—*Settlement of Real Estate—Surplus of Income to be invested in Land to be settled to like Uses—Costs of Draining and New Buildings allowed to Trustees out of Capital.*] Trustees of real estate for a term of 1000 years from the day of the death of the settlor, had powers, during a period of certain lives in being and twenty-one years, to manage the estates, and out of the income to keep down charges and incumbrances, and subject thereto to repair, erect new or additional buildings, and generally to "make such outlay for the improvement of" the estates as they should "think fit or conducive to the general benefit of" the estates "or the tenants thereof," and hold the surplus as capital, which was to be laid out in the purchase of lands to be settled to the like uses.—The settlor having died in 1870, the first tenant for life being in possession, and the income being insufficient, after keeping down charges and incumbrances, to pay for repairs, for the cost of new buildings, and generally for improvement of the property, out of capital, the Court allowed payments in draining upon

MANAGEMENT BY TRUSTEES—*continued.*
which the tenants paid £5 per cent., and in erecting new buildings. *In re* Leslie's Settlement Trusts - - - - - - 185
MANAGER OF COMPANY—Appointment of—Winding-up - - - - 126
See Receiver. 4.
—— Appointment of, in suit for foreclosure 115
See Receiver. 1.
MARGINAL NOTES—Act of Parliament - 522
See Settled Estates Act.
MARRIAGE—Consent of parents—Impossible condition - - - - 753
See Gift on attaining Twenty-one. 1.
MARRIAGE SETTLEMENT—Agreement for lien
See Agreement for Settlement. [304
—— Covenant to settle - - 363, 706
See Covenant to settle. 1, 2.
—— Divorced husband—Interest of - 318
See Divorced Husband.
—— Infant - - - - - 387
See Infant's Settlement.
—— Survivorship—Death of husband and wife at same time - - - - 213
See Presumption of Death.

MARRIED WOMEN'S PROPERTY ACT (33 & 34 *Vict. c.* 93), *s.* 10—*Policy of Insurance—Married Woman—Bankrupt—Separate Estate—Bankruptcy Act*, 1869, *s.* 91.] A husband who, before the passing of the *Married Women's Property Act*, 1870, had insured his life, and had paid one premium on the insurance, after the passing of the Act gave up the policy and received instead a policy at the same premium for a sum payable to the separate use of his wife if she survived him, and to him if he survived her. He was at the time in embarrassed circumstances, and soon afterwards came under liquidation by arrangement, and then died. His wife had separate income subject to a restraint on anticipation:—*Held*, that the insurance must be taken as effected after the passing of the *Married Women's Property Act*, and that whether the subsequent premiums were paid by the husband out of his own money or out of the income of the wife's separate estate, the money payable on the insurance did not go to the trustee under the bankruptcy, but went to the widow by virtue of the *Married Women's Property Act*, which modified the 91st section of the *Bankruptcy Act*, 1869:—*Held*, on the evidence, that the premiums were paid out of the wife's separate estate, and that, therefore, the trustee in bankruptcy would not receive out of the insurance money the amount of the premiums.—Decree of *Hall*, V.C., reversed. Holt *v.* Everall - 266

MARSHALLING—*Winding-up — Unlimited Insurance Company—Limitation of Liability on Policies—Mortgage of Limited Assets.*] The directors of an insurance company, the liability of whose members was unlimited except as to the claims of policy-holders, borrowed money for the purposes of the company's business from the company's bankers, and gave the bankers as security a charge upon some calls which had been made upon the members. Before the calls had been paid the company was ordered to be wound up. In the winding-up the debt to the bankers was paid off

MARSHALLING—*continued.*
out of the limited assets:—*Held* (reversing a decision of *Malins*, V.C.), that the policy-holders had no equity to have the assets marshalled, so as to throw any part of the banker's debt upon the unlimited assets. *In re* INTERNATIONAL LIFE ASSURANCE SOCIETY - - - - 476

MEMORANDUM OF ASSOCIATION—One subscriber an infant - - - 610
See WINDING-UP PETITION. 2.

METROPOLITAN BOARD OF WORKS CONSOLIDATED STOCK—Gift to charity - 222
See MORTMAIN.

MINERALS—Compensation for railway company [201, 235
See COMPENSATION UNDER RAILWAYS CLAUSES ACT. 1, 2.

MINING COMPANY—Appointment of manager
See RECEIVER. 1. [115

MISCONDUCT OF ARBITRATOR—*Disqualification — Jurisdiction — Injunction.*] *Semble*, the Court has jurisdiction, by analogy to a writ of prohibition, to restrain by injunction an arbitrator from proceeding with a reference on the ground of corruption. MALMESBURY RAILWAY COMPANY *v.* BUDD - - - - - 113

MISCONDUCT OF TRUSTEE IN BANKRUPTCY
See TRUSTEE IN BANKRUPTCY. [749

MISREPRESENTATION IN PROSPECTUS—*Company—Concealment—Fraud—Promotion-money—Charges—Void Agreement.*] By an agreement made between the vendor of certain ironworks and *W.* and *H.*, it was agreed that, if *W.* and *H.* succeeded within three months in getting up a company for the purchase of the ironworks at a valuation, they should, out of the purchase-money, receive £1500. By an agreement dated a few weeks later, the vendor agreed with *W.*, as trustee for the company, that the company should buy the ironworks at a valuation. *W.* and *H.* did not get up a company within the three months, but after some time they formed a company with seven shareholders, who were also the directors. These shareholders were not informed of the agreement to pay *W.* and *H.* the £1500. The company was registered, and by the articles of association the agreement for the purchase of the property at a valuation was adopted, and it was provided that the directors should pay all expenses incurred in getting up and registering the company. Very few other shares were applied for: none were allotted, and the company was wound up.—*W.* and *H.* claimed in the winding-up remuneration for their services both before and after the company was formed, and the valuer claimed his charges for valuing:—*Held*, that, though *W.* and *H.* might not have a legal claim as to services before the formation of the company, they would have had a good equitable claim, so far as the company derived benefit from them, and would have a legal claim as to services rendered after the formation of the company. But—*Held*, that the concealment of the agreement as to the £1500 constituted a fraud, and that as the shareholders had been by fraud induced to join the company, and as the company had received no benefit from the services of *W.* and *H.*, they could not claim from the company remuneration for those services:—*Held*, that any claim which the valuer

MISREPRESENTATION IN PROSPECTUS—*cont.*
might have was against *W.* and *H.* only.—Decision of *Hall*, V.C., reversed. *In re* HEREFORD AND SOUTH WALES WAGGON AND ENGINEERING COMPANY - - - - - - 621

2. —— *Company—Insufficient Capital—Shareholder's Acquiescence.*] A shareholder in a company filed a bill to have his contract to take shares declared void on the ground of deception and misrepresentation of the company by reason of their having commenced their railway when only one-fifth of the share capital was subscribed, and having entered into a contract for the construction of a part only of the proposed line, with insufficient capital:—*Held*, by *Malins*, V.C., that the grounds alleged by the Plaintiff would have been sufficient to sustain his bill, but that he had disentitled himself to relief by reason of various acts of acquiescence when he knew the financial position of the company, and by reason of delay in filing the bill:—*Held*, on appeal (without giving any opinion as to the Plaintiff's original title to relief), that his bill must be dismissed on the ground of his having continued to act as a shareholder for some months after he became aware of the circumstances on which he founded his case. SHARPLEY *v.* LOUTH AND EAST COAST RAILWAY COMPANY - 663

MONEY—In Court—Lands Clauses Act—Arrears of interest - - - - - 713
See LIMITATIONS, STATUTE OF. 2.

—— In hands of trustee in liquidation—Interest
See TRUSTEE IN LIQUIDATION. [57

—— To be invested in land—Construction of roads - - - - 522
See SETTLED ESTATES ACT.

MORTGAGE — Action — Counter-claim — Sub-mortgagees - - - - 223
See COUNTER-CLAIM. 1.

—— Foreclosure suit—Disclaimer - - 209
See COSTS IN MORTGAGE SUIT.

—— Lunatic tenant in tail - - - 61
See LUNATIC TENANT IN TAIL.

—— Mortgagee in possession—Statute of Limitations - - - - - 617
See LIMITATIONS, STATUTE OF. 1.

—— Mortgagee in possession - - 148
See MORTGAGEE IN POSSESSION.

—— Reconveyance of estate—Lunatic trustee 70
See TRUSTEE ACTS. 1.

—— Statute of Limitations - - 617, 713
See LIMITATIONS, STATUTE OF. 1, 2.

MORTGAGEE IN POSSESSION—*Solicitor—Account—Wilful Default—Allowances—Commission on Receipt of Rents—Judicature Act*, 1873, s. 24 (2)—*Rules of Court*, 1875, *Order XIX., r.* 3.] Stipulations for commission on receipt of rents and conversion of arrears of interest into principal inserted by a solicitor mortgagee in a mortgage deed prepared by himself, and insisted upon by him as the condition of any further advance to his client, will not be allowed in taking the account between the solicitor, as mortgagee in possession, and his client in a foreclosure suit.—Upon a proper case for opening signed accounts made by a mortgagor by his answer and evidence in a foreclosure suit in issue before the 2nd of November, 1875, the Court has power, under the *Judicature Act*, 1873, s. 24

MORTGAGEE IN POSSESSION—*continued.*
(2, 3), to entertain this equitable defence in the same manner as if a cross bill, or, under the new procedure, a counter-claim, had been filed for the purpose.—Form of the account directed in such a case. EYRE *v.* HUGHES - - - 148

MORTMAIN—*Will—Freemasons' Charities—Gift of Metropolitan Board of Works Consolidated Stock.*] A gift of Metropolitan Board of Works 3½ Consolidated Stock to charity is void under the *Mortmain Act.* CLUFF *v.* CLUFF - - 222

MOTION FOR JUDGMENT—*Practice—Admissions in Pleadings—Rules of Court*, 1875, *Order* XL., *r.* 11.] In a partition action in which the Defendants by their statement of defence admitted the facts stated in the Plaintiffs' statement of claim shewing the title of the Plaintiffs:—*Held* (reversing a decision of *Malins*, V.C.), that the Plaintiffs were, under Order XL., rule 11, of the Rules of Court, 1875, entitled to an order on motion directing the usual inquiries as to the persons interested in the property.—*Bennett* v. *Moore* (1 Ch. D. 692) followed. GILBERT *v.* SMITH 686

MUSEUM—Public Health Act - - 634
See ORNAMENTAL GARDEN.

NEW BUILDINGS—Settled estates—Expense of - - - - - 185
See MANAGEMENT BY TRUSTEES.

NEW TRIAL—Issues in bankruptcy - 72
See ISSUES IN BANKRUPTCY.

NEW TRUSTEE—Vesting order - - 483
See TRUSTEE ACTS. 2.

NOISE—*Nuisance—Artificial Work—Injunction—Damp.*] The occupier of a house is liable for allowing the continuance on his premises of any artificial work which causes a nuisance to a neighbour, even though it has been put there before he took possession.—In a suit by the owner and occupier of a house against the occupier of an adjoining house, complaining of noise from the Defendant's stable and of damp from an artificial mound on which it stood:—*Held*, that the Plaintiffs were entitled to an injunction to prevent the Defendant from keeping horses in his stable so as to be a nuisance; and that the Defendant was also liable for not preventing the damp from going through the Plaintiffs' wall. BRODER *v.* SAILLARD - - - - 692

NOTICE—Action—Co-Defendants - - 223
See COUNTER-CLAIM. 1.

—— Assignee of uncertificated bankrupt—After-acquired property - - - 806
See SUSPENSION OF BANKRUPTCY.

—— Disclaimer by trustee in bankruptcy 802
See DISCLAIMER.

—— Insolvency—Preference of creditor - 127
See FRAUDULENT PREFERENCE.

—— Withdrawal of offer to sell - - 463
See ACCEPTANCE OF OFFER.

NUISANCE—Noise—Damp - - - 692
See NOISE.

OBJECTION AT THE HEARING - - 298
See DEMURRER. 2.

OCCUPIER OF HOUSE—Artificial mound—Damp
See NOISE. [692

OFFER TO SELL—Withdrawal before acceptance - - - - - - 463
See ACCEPTANCE OF OFFER.

OFFICIAL LIQUIDATOR — *Winding-up — Receiver.*] The official liquidator under a winding-up is the receiver of the property of the company appointed by the Court for the benefit of all parties interested; and his right is paramount to that of receivers appointed on behalf of mortgagees of the company between the presentation of the petition and the winding-up order.—Order made on motion by the official liquidator discharging two persons appointed before the winding-up order as receivers of the property of the company in an action by mortgagees commenced after presentation of the winding-up petition. CAMPBELL *v.* COMPAGNIE GÉNÉRALE DE BELLEGARDE. *In re* COMPAGNIE GÉNÉRALE DE BELLEGARDE - - - - - - 181

OFFICIAL REFEREE—Pending proceedings 588
See PROSECUTION OF PENDING PROCEEDINGS. 3.

ORDER—For trial by jury—Demand of one party only - - - - - 72
See ISSUES IN BANKRUPTCY.

ORNAMENTAL GARDEN — *Public Walks and Pleasure-Grounds—Public Health Act*, 1848, *s.* 74 *—Library—Museum—Conservatory.*] In 1864, a municipal corporation, as local board of health, purchased under the *Public Health Act*, 1848, s. 74, a piece of land of about ten acres to be added to a public garden of fifteen acres. In 1875 the corporation determined to appropriate about a quarter of an acre at one extremity of this piece of land as a site for the erection of town buildings, and of a museum, public library and school of art, and conservatory:—*Held*, by *Bacon*, V.C., that no portion of the land could be appropriated for any of these objects, except the museum and conservatory:—*Held*, on appeal, that the erection of a free library was also allowable, as being conducive to the better enjoyment of the public walks and grounds as such. ATTORNEY-GENERAL *v.* CORPORATION OF SUNDERLAND - - 634

PACKER—Lien—Custom of trade - - 489
See CUSTOM OF TRADE.

PAID-UP SHARES—Agent of company - 1
See FIDUCIARY RELATION. 1.

PARSONAGE—Repairs—Purchase-money under Lands Clauses Act - - 225
See REINVESTMENT OF PURCHASE-MONEY. 1.

PARTICULARS OF PRIOR USER - - 533
See PATENT SUIT.

PARTIES—Joinder of - - - - 369
See JOINDER OF PARTIES.

PARTNERSHIP—Liquidation of one partner—Costs of solicitor - - - 320
See COSTS OF LIQUIDATION.

—— Non-trading partner—Bankruptcy - 9
See DEBTOR'S SUMMONS. 1.

PASSING OF ACT—Bankruptcy Act, 1861—Time of contracting debt - - 9
See DEBTOR'S SUMMONS. 1.

PATENT—Particulars of prior user - 533
See PATENT SUIT.

ATENT—*continued.*
— Specification of - - - - 812
See Specification of Patent.

ATENT SUIT—*Exceptions to Answer—Infringement of Patent—Insufficiency—Particulars of prior ser.*] In a suit to restrain the infringement of patent the Defendant was required to state nether he was not making articles in all respects entical with those of the Plaintiff, and to set rth in what respects they differed and by what ocess they were made:—*Held*, that the Defennt, who alleged prior user by himself and hers, had sufficiently answered by stating that, ve so far as the articles manufactured by him fore the date of the patent were similar to ose of the Plaintiff, the articles he now made ffered from those made by the Plaintiff, but he uld not shew in what they differed without ular demonstration:—*Held*, also, that the Deidant was bound, in alleging prior user by ner persons, to set forth the names of some of ose persons. Crossley *v.* Tomey - 533

ATENTEE—Disqualification of - - 812
See Specification of Patent.

AYMENT OUT OF COURT—Deposit by railway company—Insolvency - - 373
See Deposit by Company.

— Petition for—Lands Clauses Act—Apportionment of costs - - - - 360
See Costs under Lands Clauses Act.

ENDING MOTION—Amendment of writ 221
See Amendment of Pleadings.

ENDING PROCEEDINGS—Adding fresh evidence—Old practice - - 127
See Prosecution of pending Proceedings. 1.

— Prosecution of - - 127, 586, 588, 729
See Prosecution of pending Proceedings. 1—4.

— Right to trial by jury - - - 746
See Trial by Jury.

ERIOD OF DISTRIBUTION—Gift on attaining twenty-one - - - 753, 783
See Gift on attaining Twenty-one. 1, 2.

ERSON OF UNSOUND MIND—Guardian and maintenance—Jurisdiction - 124
See Guardian.

ETITION FOR ADJUDICATION—*Bankruptcy—Petitioning Creditor's Debt—Damages in Divorce Suit*—20 & 21 *Vict. c.* 85, *s.* 33.] In a divorce it a decree for a divorce was made, and the co-pondent was ordered to pay into the registry 000, the amount of damages assessed by the y. This decree was made absolute. The co-pondent being resident abroad, the order for yment could not be enforced against him, and order was obtained from the Divorce Court cinding so much of the decree as ordered payent into the registry, and ordering the £5000 to paid to the husband, he undertaking to pay it o the registry to abide the further order of the urt. The husband then commenced proceedgs in bankruptcy against the co-respondent:—*ld* (reversing the decision of the Registrar), t the £5000 did not constitute a good petitioning creditor's debt. *Ex parte* Muirhead. *In re* Muirhead - - - - - 22

PETITION FOR ADJUDICATION—*continued.*
—— Concurrent resolution for liquidation 331
See Resolution for Liquidation. 1.

PETITION FOR SALE — *Practice — Chancery Amendment Act* (15 & 16 *Vict c.* 86), *s.* 55—*Decree—Petition, before Chief Clerk's Certificate, for Sale of Real Estate.*] By a decree accounts were directed of the deficiency, if any, in trust funds which the estate of a deceased trustee was declared liable to answer. Before certificate, but after it had been ascertained that there would be a deficiency, and that the personal estate of the deceased trustee would be insufficient, the existing trustee had redeemed a mortgage on the real estate of the deceased trustee, and the persons interested in the trust fund now petitioned for an immediate sale of the property so redeemed:—*Held*, that the Court had jurisdiction to order the sale under 15 & 16 Vict. c. 86, s. 55. Bell *v.* Turner - - - - - 409

PETITION FOR WINDING-UP - 116, 610, 763
See Winding-up Petition. 1, 2, 3.

PETITION UNDER LANDS CLAUSES ACT—Payment out of Court - - - 360
See Costs under Lands Clauses Act.

PETITIONING CREDITOR—Debt of - 22
See Petition for Adjudication.

PLACES OF WORSHIP SITES ACT—*Guardian*—(36 & 37 *Vict. c.* 50), *s.* 1.] *Held*, by *James* and *Mellish*, L.JJ., and *Blackburn*, J. (reversing the decision of the Master of the Rolls), *dissentiente Baggallay*, J.A., that a father who was a tenant for life of a settled estate could, as guardian by nature of his infant son, who was entitled to the inheritance in remainder, concur on the son's behalf in a grant by himself of part of the settled estate as a site for a church, under 36 & 37 Vict. c. 50, s. 1. *In re* Marquis of Salisbury and the Ecclesiastical Commissioners - - 29

"PLATE, FURNITURE, AND OTHER EFFECTS"
See Residuary Gift. 1. [122

PLEADING—Citation of third party 51, 721
See Citation of Third Party. 1, 2.
—— Counter-claim - - - 223, 736
See Counter-claim. 1, 2.
—— Disclaimer—Foreclosure suit - - 209
See Costs in Mortgage Suit.

PLEASURE-GROUNDS—Public Health Act 634
See Ornamental Garden.

POLICY—Life insurance—Limitation of liability
See Marshalling. [476
—— Life insurance—Married woman's property [266
See Married Women's Property Act.

PORTIONS—*Satisfaction—Rule against Double Portions.*] *A.*, upon the marriage, in 1851, of *B.*, one of his two daughters, covenanted with the trustees of her settlement to give her or her trustees by his will one moiety of all the real and personal estate to which he should be entitled at his death, subject to payment of debts and to such devises and bequests (not exceeding in the whole one-fourth of the said real and personal estate) as he might think fit to make. And the deed contained a covenant for the settlement of any pro-

PORTIONS—*continued.*
perty which should be so given on specified trusts.—By his will, made in 1864, *A.*, after giving an annuity and directing payment of his debts out of his personal estate, directed the trustees to stand possessed of one moiety of the proceeds of his real and residuary personal estate upon trust for *B.*, for her separate use for life, with remainder to her husband until bankruptcy or alienation, and remainder to her children as she should by deed or will appoint, and in default of appointment, to her children equally as tenants in common, with limitations over on the trusts of the other moiety which were in favour of *A.*'s other daughter *C.* and her children.—The limitations in the settlement of 1851 were not identical with those of the will; in particular, the husband took the first life interest, which was not made determinable upon bankruptcy or alienation, and the limitations to children were confined to the children of the marriage, and were subject to a joint power of appointment in husband and wife: —*Held*, that the legal presumption that the covenant had been satisfied by the gift in the will was not rebutted by the difference of the limitations in the two instruments, having regard to the identity of the subject-matter; and that *B.* and the other persons interested must elect between the provisions covenanted to be made by the settlement and given by the will. Russell *v.* St. Aubyn 398

POSTPONED CREDITORS—*Bankruptcy—Scheme of Settlement—Annulling Adjudication—Payment of Composition to some Creditors—Postponement of Debts of others—Fresh Trading by Bankrupt—Subsequent Liquidation Petition—Rights of Postponed Creditors—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 28.] The creditors of a bankrupt agreed, under sect. 28 of the Act, to a scheme for the settlement of his affairs, which was afterwards approved by the Court. The scheme provided that a composition of 9*s.* 6*d.* in the pound should be paid to all the creditors but three; that the bankrupt should take back his estate; and that the adjudication should be annulled. The three excepted creditors agreed to make no claim on the bankrupt or his estate for three years from the date of the annulling of the adjudication. On the 20th of April, 1871, the order to annul was made. The composition was paid, the bankrupt took back his estate; he traded again and contracted fresh debts, and on the 1st of October, 1875, he filed a liquidation petition:—*Held* (reversing the decision of the County Court Judge) that the excepted creditors were entitled to prove in the liquidation, and to receive dividends *pari passu* with the new creditors:—*Held*, that the principle of *Troughton* v. *Gitley* (Amb. 629) and *Ex parte Bourne* (2 Gly. & J. 137) had no application. *Ex parte* Russell. *In re* Winn - - 424

PARENTS—Consent of—Impossible condition 753
See Gift on attaining Twenty-one. 2.

POWER—To refuse transfer of shares . - 101
See Transfer of Shares.

PRACTICE—Absconding Defendant—Service 218, [220
See Substituted Service. 1, 2.

—— Amendment of writ - - - 221
See Amendment of Pleadings.

PRACTICE—*continued.*
—— Appeal—After inrolment - - 304
See Inrolment of Decree.
—— Appeal for costs - - - 69
See Appeal for Costs.
—— Appeal—Security for costs - 67, 325, 811
See Security for Costs. 1, 2, 3.
—— Attachment of person—Costs - - 528
See Costs of Attachment.
—— Bankruptcy—Disclaimer - - 802
See Disclaimer.
—— Citation of third party - 51, 721
See Citation of Third Party. 1, 2.
—— Costs under Lands Clauses Act - 360
See Costs under Lands Clauses Act.
—— Counter-claim - - - 223, 736
See Counter-claim. 1, 2.
—— Demurrer—Objection taken at hearing 298
See Demurrer. 2.
—— Demurrer—Time for pleading - 112
See Demurrer. 1.
—— District Registrar—Powers of - 608
See District Registrar.
—— Evidence by affidavit - - - 586
See Prosecution of pending Proceedings. 2.
—— Extension of time for defence - 112
See Demurrer. 1.
—— Indorsement of writ - - - 109
See Action on behalf of Several.
—— Interrogatories - - - - 704
See Interrogatories.
—— Joinder of actions - - - 111
See Joinder of Causes of Action.
—— Joinder of parties - - - 360
See Joinder of Parties.
—— Motion for judgment - - - 686
See Motion for Judgment.
—— Official referee - - - - 588
See Prosecution of pending Proceedings. 3.
—— Petition for sale - - - - 409
See Petition for Sale.
—— Places of Worship Sites Act—Consent of guardian - - - - 29
See Places of Worship Sites Act.
—— Production of documents - 140, 644
See Production of Documents. 1, 2.
—— Prosecution of pending proceedings 127, [586, 588, 729
See Prosecution of pending Proceedings. 1—4.
—— Receiver - - - 115, 291, 302, 726
See Receiver. 1—4.
—— Security for costs - 67, 325, 531, 811
See Security for Costs. 1—4.
—— Staying proceedings - - 492, 547
See Staying Proceedings. 1, 2.
—— Substituted service - - 218, 220
See Substituted Service. 1, 2.
—— Trial by jury—Right to - - 746
See Trial by Jury.
—— Trustee Acts - - - 72, 483
See Trustee Acts. 1, 2.

PRESUMPTION OF DEATH—*Marriage Settlement—Reduction into Possession—Deaths at Sea of Husband and Wife—Legal Personal Representatives of each Settlor entitled to the Settled Funds.*] By a settlement made on the marriage of *L.* and *G.*, *L.* agreed that he would, after the marriage, transfer to the trustees a sum of consols, and *G.* assigned unto the same trustees some Portuguese bonds. The trustees were to pay the income of the consols to *L.* for life, and after his death to pay it to *G.* for life, and after the death of the survivor, in trust for the children of the marriage, and if none, in trust for the survivor of *L.* and *G.*, his or her executors and administrators. The trustees were to pay the income of the bonds to *L.* during his and *G.*'s joint lives, and in case he should survive, then, after *G.*'s decease, to transfer the bonds to whom she might appoint by will, and in default of appointment, to her next of kin; but if she should survive *L.*, then in trust to transfer the bonds to her, her executors or administrators. After the marriage, the consols were transferred to the trustees. *L.*, by will, gave to his wife the whole of his property absolutely, and *G.* bequeathed the whole of her property to her husband for life, and after his death, to her sisters. Both husband and wife, who left *Liverpool*, in April, 1874, in the *Liberia*, were, with all hands on board, drowned at sea:—*Held*, that the funds settled belonged to the legal personal representatives of each settlor. WOLLASTON *v.* BERKELEY [213

—— Mortgagor - - - - 617
See LIMITATIONS, STATUTE OF. 1.

PRIOR USER—Patent—Anticipation - 812
See SPECIFICATION OF PATENT.

—— Patent—Particulars of - - - 533
See PATENT SUIT.

PRIORITY—Debenture holders—General creditors of company - - - 337
See DEBENTURE. 1.

PRIVILEGED COMMUNICATION—Letter from agent - - - - 644
See PRODUCTION OF DOCUMENTS. 2.

PRODUCTION OF DOCUMENTS—*Practice—Discovery—Summons by Plaintiff before delivery of Statement of Claim—Summons dismissed—Rules of Court*, 1875, *Order* XXXI., *rr.* 11, 12, 18, 19.] It is not consistent with the practice of the Court to make an order for production of documents on the solicitor of a party against whom discovery is sought.—A Plaintiff will not in general be allowed production from a Defendant until he has delivered a statement of claim.—A Plaintiff (after the 2nd of November, 1875) issued a writ of summons against several Defendants, the indorsement of claim comprising a great variety of seemingly unconnected matters; and then, before delivering a statement of claim, took out a summons for the production, "by the solicitor of the Defendants and others named in" a schedule to an affidavit of even date, of certain documents specified in the schedule; stating by the affidavit that the specified documents were in the possession of the persons named, and that the whole of the documents related to the action, and were essential to establish the Plaintiff's case:—*Held*, that the Plaintiff

PRODUCTION OF DOCUMENTS—*continued.*
was not entitled to the production asked. CASHIN *v.* CRADDOCK - - - - - 140

2. —— *Privileged Communication—Letter from Agent to Principal.*] A bill was filed against a banking company to compel them to replace a sum of money alleged to have been improperly transferred by them from one account to another at their branch bank at *Oregon*. Before the bill was filed, but after litigation had become highly probable, the manager in *London* telegraphed to the manager in *Oregon* to send full particulars of the whole transaction. On an application by the Plaintiffs in the suit for production of documents, the bank resisted production of the letter sent in answer, as being privileged:—*Held* (affirming the decision of the Master of the Rolls), that the letter was not privileged, and must be produced.—*Ross* v. *Gibbs* (Law Rep. 8 Eq. 522) explained.—Under the Judicature Acts the right to discovery is regulated by the rules previously existing in the Court of Chancery. ANDERSON *v.* BANK OF BRITISH COLUMBIA - - - - - 644

PROMOTION MONEY—Agreement as to—Concealment of - - - - 621
See MISREPRESENTATION IN PROSPECTUS. 1.

PROPERTY IN GOODS—Appropriation of consignments—Agent - - - 278
See SECURITIES FOR BILLS OF EXCHANGE.

PROSECUTION OF BANKRUPT — *Fraudulent Debtor—Application to Court Ex parte—Order by Registrar acting as Judge—Appeal—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *ss.* 11, 16, 17—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 71.] When a trustee in bankruptcy applies to the Court, under sect. 16 of the *Debtors Act*, 1869, for an order to prosecute the bankrupt for offences under that Act, the application is properly made *ex parte*, without any notice to the bankrupt, and the bankrupt cannot appeal from the order.—Such an order may be made without any further evidence than the report of the trustee, if the Court is satisfied from that alone that there is a reasonable probability of a conviction.—*Ex parte Leonard* (Law Rep. 19 Eq. 269) explained.—*Held*, by *Bacon*, C.J., that when an order has been made by a Registrar of a County Court acting as Judge, the Judge has no power to rehear the matter or to vary the order, which can only be altered by means of an appeal to the Chief Judge. *Ex parte* MARSDEN. *In re* MARSDEN - - - - - 786

2. —— *Accomplice—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *ss.* 11, 16—*Right to appeal—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 71.] An order was made under the 11th section of the *Debtors Act*, 1869, for the prosecution of a bankrupt, and also for the prosecution of another person as his accomplice:—*Held*, that the accomplice was not a person aggrieved within the 71st section of the *Bankruptcy Act*, 1869, and had no right to appeal against the order. *Ex parte* BROWN. *In re* APPLEBY - - - - 799

PROSECUTION OF PENDING PROCEEDINGS—*Replication — Adding fresh Evidence* — 15 & 16 *Vict. c.* 86, *s.* 38.] Where in a cause heard on replication it is sought to put in evidence filed after the time for closing evidence has expired, leave to

PROSECUTION OF PENDING PROCEEDINGS—*continued.*

read such evidence must be applied for previously to the hearing, in order to enable the Court to provide an opportunity to the adverse party to answer such evidence. It will not be sufficient to deliver a copy of the evidence to the other party in time for him to answer it. SMITH *v.* PILGRIM [127

2. —— *Practice—Judicature Act*, 1873, *s.* 22—*Mode of taking Evidence—Refusal by Party to have Evidence taken by Affidavit—Costs of Opposition ordered to be paid by refusing Party—Rules of Court*, 1875, *Order* XXXVII., *r.* 1.] Evidence in a cause pending on the 2nd of November having been taken by affidavit, but the affidavits not having been filed before the rule as to pending causes was laid down by the Judges, and the cause having been ordered to proceed under the new practice, a motion was made on behalf of the Plaintiff that the evidence might be taken by affidavit. One of the Defendants, a trustee, opposed the motion. The motion was refused, and the costs were reserved, but ultimately were ordered to be paid by the trustee. PATTERSON *v.* WOOLER - - - - - - 586

3. —— *Practice—Judicature Act*, 1873, *s.* 57—*Official Referees—Rules of Court*, 1875, *Order* XXXVI., *rr.* 2, 5.] Plaintiff, a landowner, filed a bill against an adjoining owner of land, praying for a declaration that the boundary between the two properties was marked out and prescribed as appeared in a plan annexed to the bill. Replication having been filed before the 2nd of November, 1875, the Plaintiff, on the 17th of November, obtained an order that the evidence at the hearing should be taken *vivâ voce*. On the 9th of December he served the Defendant with notice of trial, and on the 8th of February, 1876, he took out a summons to shew cause why the trial should not be referred to one of the official referees of the Court (naming one of the referees).—*Semble*, the Plaintiff having obtained an order under the new procedure as to the mode in which the evidence to be used at the trial should be taken, was not at liberty to change his mode of proceeding.—*Held*, moreover, as the application was not made within four days after notice of trial, and as there had not been an application for extension of time, that the summons was irregular, and must be dismissed. LASCELLES *v.* BUTT - - - - 588

4. —— *Practice—Amendment of Bill—Rules of Court*, 1875, *Order* XXVII., *r.* 1.] In a suit to set aside a settlement on the ground of fraud and surprise on the Plaintiff, evidence was filed in reply tending to shew that the Plaintiff, at the time of executing the settlement, was of infirm mind.—Upon the hearing of a motion for leave to use this evidence (which had been objected to as not being properly evidence in reply), Plaintiff asked for leave to amend the bill, and go into fresh evidence.—The cause was at issue before the 1st of November, 1875; and the hearing had been fixed, and only accidentally postponed.—Leave was given to the Plaintiff to amend the bill, and go into further evidence.—An order asked for by the Defendant, that the evidence should be taken *vivâ voce*, was refused. ROE *v.* DAVIES - 729

PROSECUTION OF PENDING PROCEEDINGS—*continued.*

—— Trial by jury - - - - 746
See TRIAL BY JURY.

PROSPECTUS—Company—Misrepresentation [621, 663
See MISREPRESENTATION IN PROSPECTUS. 1, 2.

PUBLIC GARDENS—Public Health Act - 634
See ORNAMENTAL GARDEN.

PUBLIC OFFICER—Disqualification from taking out patent - - - - 812
See SPECIFICATION OF PATENT.

PURCHASE-MONEY—Apportionment of—Sale by trustee and beneficiary - - 540
See SALE BY TRUSTEE.

—— Lands Clauses Act—Reinvestment 225, 690
See REINVESTMENT OF PURCHASE-MONEY. 1, 2.

QUEEN ANNE'S BOUNTY — Purchase-money under Lands Clauses Act - - 225
See REINVESTMENT OF PURCHASE-MONEY. 1.

RAILWAY COMPANY—Compensation for minerals - - - - 201, 235
See COMPENSATION UNDER RAILWAYS CLAUSES ACT. 1, 2.

—— Reinvestment of purchase-money 225, 690
See REINVESTMENT OF PURCHASE-MONEY.

RECEIVER — *Foreclosure — Action by Debenture Holder against a Mining Company—Interim Appointment of Manager — Jurisdiction.*] In an action by debenture holders of a mining company against the company for foreclosure the Court has jurisdiction to make an interim order for the appointment of a manager. PEEK *v.* TRINSMARAN IRON COMPANY - - - - 115

2. —— *Appointment of Receiver nominatim.*] An order was made at the suit of an equitable mortgagee "that *C. E. M.*, upon his giving security, be appointed receiver," of certain chattels comprised in the security. After this order, but before security had been given, an execution creditor of the mortgagor took the chattels in execution:—*Held* (reversing the decision of *Malins*, V.C.), that the receiver was not constituted receiver till he had given security, and that the taking the chattels in execution was not a contempt of Court. EDWARDS *v.* EDWARDS - - - 291

3. —— *Practice — Interim Appointment of Plaintiff—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8—*Rules of Court*, 1875, *Order* LII., *r.* 4.] In an action to enforce specific performance of a parol agreement to execute a bill of sale of personal chattels, upon an *ex parte* motion before appearance of the Defendant, there being evidence of immediate danger of the chattels in question being disposed of, an order was made appointing the Plaintiff (without security) interim receiver for fourteen days, or until a receiver should be appointed under a reference to Chambers for that purpose which the Vice-Chancellor had directed. The Plaintiff undertook to deal with the property only under the direction of the Court, and to abide by any order which

RECEIVER—*continued.*
the Court might make as to damages or otherwise. Taylor *v.* Eckersley - - - 302

4. —— *Company — Voluntary Liquidation — Manager—Creditors' Action.*] On the application of an unpaid vendor of the property of a company in voluntary liquidation, and unable from insolvency to carry on its works, the vendor was appointed receiver without security or salary.—*Perry* v. *Oriental Hotels Company* (Law Rep. 5 Ch, 420) distinguished. Boyle *v.* Bettws Llantwit Colliery Company - - - - 726

—— Debt due to—Debtor's summons - 423
See Debtor's Summons. 2.

—— Winding-up of company—Official liquidator
See Official Liquidator. [181

RECITALS—Estoppels by - - - 72
See Estoppel by Deed.

RECONVEYANCE OF MORTGAGED ESTATE—Lunatic trustee - - - 70
See Trustee Acts. 1.

RECTORY — Repairs — Purchase-money under Lands Clauses Act - - 225
See Reinvestment of Purchase-money. 1.

REDUCTION INTO POSSESSION — Death of husband and wife at same time - 213
See Presumption of Death.

REGISTER—Debentures of company 337, 345
See Debenture. 1, 2.

REGISTRATION—Bill of sale - - 291
See Registration of Bill of Sale.

—— Company—One of seven subscribers an infant - - - - 610
See Winding-up Petition. 2.

—— Resolution for composition - - 323
See Resolution for Composition.

—— Resolution for liquidation - - 231, 326
See Resolution for Liquidation. 1, 2.

REGISTRATION OF BILL OF SALE—17 *&* 18 *Vict. c.* 36, *s.* 1—*Notice of Unregistered Bill of Sale.*] A deed by which a debtor covenants that if the debt is not paid on a day named certain chattels shall be charged with it, and that he will, when required, assign them to the creditor as security, requires registration as a bill of sale. —The fact that an execution creditor was, at the time when his debt was contracted, aware that his debtor had given a bill of sale of chattels, does not prevent his availing himself of the objection that it has not been registered. Edwards *v.* Edwards - - - - - - 291

REHEARING IN BANKRUPTCY—*Time—Appeal* —32 *&* 33 *Vict. c.* 71, *s.* 71—*Bankruptcy Rules,* 1870, *r.* 143.] When an order has been made, the Court ought not to allow a rehearing of the matter merely for the purpose of enabling an appeal to be brought which would otherwise have been too late. *Ex parte* Simmons. *In re* Lister [749

—— County Court Judge - - - 786
See Prosecution of Bankrupt. 1.

REINVESTMENT OF PURCHASE-MONEY — *Railway Company — Glebe Lands — Purchase-money in Court—Repairs to Rectory Buildings and Chancel of Church—Queen Anne's Bounty.*] The purchase-money of glebe lands taken by a railway company had been paid into Court, and on a petition presented by the rector, the prayer that a portion of it might be allowed for the repairs of the rectory buildings was granted, and that other portions of it might be allowed for the restoration of the chancel, and in paying off the money borrowed from the Governors of Queen *Anne's* Bounty, was not. *In re* Louth and East Coast Railway Company. *Ex parte* Rector of Grimoldby - - - - - 225

2. —— *Lunacy—Lands Clauses Consolidation Act,* 1845, *s.* 69.] The purchase-money of a lunatic's land taken by a public body under the *Lands Clauses Act* was, under the circumstances, ordered to be invested in guaranteed railway stock; but the name of the public body was directed to be omitted from the title of the account, an investment of this nature being treated as equivalent to a reinvestment in land. *In re* Buckingham (a Person of Unsound Mind) 690

RELIGIOUS OPINIONS — Trustees of charity scheme - - - - 554
See Charity Scheme.

REMAINDERMAN—Lunatic tenant in tail 61
See Lunatic Tenant in Tail.

REMUNERATION—Trustee in bankruptcy—Disallowance - - - - 749
See Trustee in Bankruptcy.

RENEWAL OF LEASE—*Condition Precedent—Lease to Two.*] A lease was granted to two, with a proviso for re-entry in case the rent should be in arrear for thirty days, or the tenants or either of them should become bankrupt, or let, assign, or part with the premises, or any part thereof, without license; or if the tenants should not keep the covenants (which were joint and several covenants), one of which was to keep the interior of the property in repair. The landlord covenanted that he would, at the expiration of the term (in case the covenants on the tenants' part should have been duly performed), grant to "the tenants, their executors and administrators," a fresh lease, subject to the same covenants, provided the tenants or either of them, their or either of their executors or administrators, should, twenty days before the end of the term, give the landlord notice of the desire to take such lease. One of the tenants became bankrupt, shortly before which he assigned his interest in the lease to the other tenant. The landlord, with knowledge of this, received rent to the end of the term. The continuing tenant, twenty-one days before the end of the term, gave the landlord notice to grant the renewed lease to him. At this time the interior of the property required repairs to the amount of at least £13. *Malins*, V.C., decided that the lease must be granted, the repairs required being only trifling:—*Held*, on appeal, that the tenant was not entitled to a renewed lease, for that, 1, the granting it was subject to a condition precedent that the covenant of the lease should have been kept, which condition had not been performed, as there was a want of repair which, though not serious, constituted an existing breach of covenant when the new lease was applied for; and, 2, the agreement being to grant a lease to the two, who

RENEWAL OF LEASE—*continued.*
must enter into joint and several covenants, and both being alive, the landlord could not be called upon to grant a lease to one only. Finch *v.* Underwood - - - - - 310

REPLICATION—Cause heard on—Old practice [127
See Prosecution of pending Proceedings. 1.

RESIDUARY GIFT—*Will—Words, "Plate, Linen, Furniture, and other Effects"—Ejusdem generis.*] Testatrix, after devising certain freehold property, bequeathed to the Plaintiffs "all my plate, linen, furniture, and other effects that may be in my possession at the time of my death." She was at the time of her death entitled to the property devised by her will, to furniture, plate, linen, wearing apparel, and jewellery, and to certain sums of money:—*Held*, that the Plaintiffs were entitled to the residuary personal estate of the testatrix. Hodgson *v.* Jex - - - 122

2. —— *Will—Construction—Annuity—Abatement—Residue or Remainder.*] A testatrix gave several life annuities and directed funds to be invested, producing an income sufficient to meet them. She bequeathed the residue of her estate, "including the fund set apart to answer the said annuities when and so soon as such annuities shall respectively cease," to *J. B. T.* The estate was only sufficient to pay about 5*s.* in the pound on the legacies and the values of the life annuities, and under an order of the Court the sums apportioned to the values of the life annuities were invested, and the dividends paid to the annuitants. On the death of one of the annuitants, *J. B. T.* applied for payment to him of the fund of which that annuitant had been receiving the income:—*Held*, by *Bacon*, V.C., that *J. B. T.* was entitled:—*Held*, on appeal, that *J. B. T.* had only the ordinary rights of a residuary legatee, and could take nothing until the legacies and annuities had all been paid in full, and that his application must be dismissed. *In re* Tootal's Estate. Hankin *v.* Kilburn - - 628

RESOLUTION FOR COMPOSITION — *Power of Majority to bind Minority—Bona fides—Fraud—Motives of Kindness to Debtor—Small Amount of Composition compared with Assets—Registration of Resolutions—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 126—*Bankruptcy Rules*, 1870, *r.* 295.] The statement of a debtor who had filed a liquidation petition shewed that his debts amounted to £1257, and that his assets were worth £371. The creditors resolved to accept a composition of 1*s.* in the pound, to be paid in twelve months. One creditor opposed the registration of the resolution:—*Held*, that, having regard to the amount of the assets, the resolution could not have been passed *bonâ fide*, and that registration of it had been rightly refused. *In re* Page. *Ex parte* Page - - - - - - 323

RESOLUTION FOR LIQUIDATION—*Registration of Resolutions—Concurrent Bankruptcy and Liquidation Petitions—Adjudication made before Liquidation Resolutions passed—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 125—*Bankruptcy Rules*, 1870, *rr.* 266, 295.] On the 1st of December a bankruptcy petition was presented against a

RESOLUTION OF LIQUIDATION—*continued.*
debtor. On the 9th of December he filed a liquidation petition. On the 11th of December an adjudication was made, the debtor not opposing. No stay of proceedings under the adjudication was directed. On the 29th of December the creditors met under the liquidation petition, and resolved on a liquidation by arrangement, and that the adjudication be annulled:—*Held* (reversing the decision of the County Court Judge), that the liquidation resolutions must be registered. *Ex parte* Davis. *In re* Russ - - - 231

2. —— *Passing of Special Resolution—Sufficiency of Debtor's Statement of Affairs—Registration—Powers of Registrar—Appeal by Creditors not heard before Registrar—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 125—*Bankruptcy Rules*, 1870, *rr.* 295, 301.—The meaning of rule 301 of the Bankruptcy Rules, 1870, is, that, on the presentation of a special resolution for liquidation by arrangement, to the Registrar for registration, the passing of the resolution is conclusive evidence that the debtor's statement of affairs is sufficient, and the Registrar has no power to inquire into the sufficiency of the statement.—If however, it is clear *ex facie* that the statement produced by the debtor is one which the majority of the creditors could not have accepted *bonâ fide* in the interest of the creditors, this may be taken as an objection to the registration of the resolution, but it cannot be raised after registration.—If the statement is a fraudulent one, the proper course for a dissentient creditor to take is to move, after the resolution has been registered, to have the registration vacated. —Creditors who have not been heard before the Registrar on an application for the registration of resolutions, or before the Chief Judge on an application to reverse the order for registration, have a *locus standi* to appeal from the order of the Chief Judge.—The Registrar may register resolutions for liquidation, omitting from them, with the debtor's consent, a resolution for an immediate discharge. *In re* Webb. *Ex parte* Walter 326

RETAINER BY EXECUTOR—*Administration Suit—Proof of Debt by Executor—Bequest of Debt—Deficient Fund—Costs.*] A creditor proved his debt in an administration suit and then died, having bequeathed the debt to the executrix of the testator in the cause:—*Held*, that she had no right of retainer in respect of it. Jones *v.* Evans [420

REVERSIONARY INTEREST OF WIFE—After-acquired property - - - - 362
See Covenant to settle. 1.

—— Infant - - - - - 387
See Infant's Settlement.

ROADS AND SEWERS—Construction of—Settled Estates Act - - - - 522
See Settled Estates Act.

RULE AS TO 45°—Ancient lights - - 165
See Light and Air.

RULE IN WILD'S CASE—*Will—Gift over on Wife's Second Marriage—Death of Wife without marrying again—Words "Children and Issue and their Heirs"—Estates Tail.*] Testator gave his real and personal estate to a trustee upon trust to pay the proceeds to his wife for the maintenance and education of his children until the eldest

RULE IN WILD'S CASE—*continued.*
should attain twenty-five, or until his wife should marry again; and, in case of her second marriage before any of his children should attain twenty-five, to pay her £30 a year, and apply the residue towards the maintenance and education of his children: and when his two sons should attain twenty-five, then to raise certain sums for them, and pay the proceeds of the residue to his wife if she should be then unmarried, but in case she should marry again, then, after providing an annuity for her for her separate use, to pay the residue equally between the testator's children and their issue and their heirs as tenants in common; and in case both his children should die under twenty-five without leaving issue, then to give the proceeds to his wife for life; and after her death the said property to be in trust as to one moiety for the wife, and as to the other for the trustee absolutely.—The wife survived the testator and died without having married again, leaving the testator's only two sons surviving, who had since attained twenty-five, but who had no issue: —*Held*, that the gift over of the real estate on the second marriage of the wife took effect on her death:—*Held*, also, that the sons took equitable estates tail according to the rule in *Wild's Case* (6 Rep. 16 b.).—*Pile* v. *Salter* (5 Sim. 411) disapproved. UNDERHILL *v.* RODEN - - 494

RULES OF SUPREME COURT, 1875, Order IX., r. 2 - - - - 218, 220
See SUBSTITUTED SERVICE. 1, 2.

—— **Order XV., r. 1** - - - - 608
See DISTRICT REGISTRAR.

—— **Order XVI., r. 9** - - - - 109
See ACTION ON BEHALF OF SEVERAL.

—— —— **rr. 13, 14** - - - - 369
See JOINDER OF PARTIES.

—— —— **rr. 13, 17** - - - 51, 721
See CITATION OF THIRD PARTY. 1, 2.

—— —— **rr. 17, 18, 19** - - 223, 736
See COUNTER-CLAIM. 1, 2.

—— **Order XVII., r. 2** - - - 111
See JOINDER OF CAUSES OF ACTION.

—— —— **rr. 5, 8** - - - - 736
See COUNTER-CLAIM. 2.

—— **Order XIX., r. 3** - - - - 736
See COUNTER-CLAIM. 2.

—— —— —— - - - - 148
See MORTGAGEE IN POSSESSION.

—— **Order XXII., r. 1** - - - 112
See DEMURRER. 1.

—— —— **r. 9** - - - - 736
See COUNTER-CLAIM. 2.

—— **Order XXVI., r. 1** - - - 746
See TRIAL BY JURY.

—— **Order XXVII., r. 1** - - - 729
See PROSECUTION OF PENDING PROCEEDINGS. 4.

—— **Order XXVIII., r. 3** - - - 112
See DEMURRER. 1.

—— **Order XXX., r. 1** - - - 704
See INTERROGATORIES.

—— **Order XXXI., rr. 11, 12, 18, 19** - 140
See PRODUCTION OF DOCUMENTS. 1.

RULES OF SUPREME COURT, 1875—*continued.*
—— **Order XXXIV., r. 2** - - - 547
See STAYING PROCEEDINGS. 2.

—— **Order XXXV., r. 1** - - - 608
See DISTRICT REGISTRAR.

—— **Order XXXVI., rr. 1, 3, 8, 16, 27, 29** - 746
See TRIAL BY JURY.

—— —— **rr. 2, 5** - - - - 588
See PROSECUTION OF PENDING PROCEEDINGS. 3.

—— **Order XXXVII., r. 1** - - - 586
See PROSECUTION OF PENDING PROCEEDINGS. 2.

—— —— **r. 4** - - - - 217
See SPECIAL EXAMINER.

—— **Order XL., r. 11** - - - - 547
See STAYING PROCEEDINGS. 2.

—— —— —— - - - - 686
See MOTION FOR JUDGMENT.

—— **Order XLIV., r. 2** - - - 528
See COSTS OF ATTACHMENT.

—— **Order LII., r. 4** - - - - 302
See RECEIVER. 3.

—— **Order LV., r. 2** - - - 528
See COSTS OF ATTACHMENT.

—— **Order LVIII., r. 15** - - 67, 325, 811
See SECURITY FOR COSTS. 1, 2, 3.

—— —— **rr. 16, 17** - - - - 492
See STAYING PROCEEDINGS. 1.

—— **App. A., Part 2, s. 1** - - - 109
See ACTION ON BEHALF OF SEVERAL.

SALE—Heirlooms—Jurisdiction - - 711
See HEIRLOOMS.

—— Land—Petition for before Chief Clerk's certificate - - - - 409
See PETITION FOR SALE.

—— Offer and acceptance—Withdrawal - 463
See ACCEPTANCE OF OFFER.

—— Property of liquidating debtor—Joint and separate estates - - - 172
See JOINT AND SEPARATE ESTATES.

—— Trust estate—Purchase by trustees of selling trustee's settlement - - 190
See FIDUCIARY RELATION. 2.

—— Trust estate—Trustee and beneficial owner—Apportionment of purchase-money 540
See SALE BY TRUSTEE.

SALE BY TRUSTEE—*Vendor and Purchaser—Specific Performance—Joint Sale by Trustee and absolute Owner—Apportionment of Purchase-money.*] A trustee having a discretionary trust for sale of real estate under a will at such price as he should think reasonable, with power to postpone the sale, leased the property for thirty years with the concurrence of the beneficiaries. Before the lease expired the property was put up for sale by the lessee and the trustee conjointly, the facts being disclosed by the particulars of sale, and a sale having been effected, the purchase-money was apportioned between the two interests according to the valuation of a skilled valuer:—*Held*, that the purchaser was not entitled to insist on the concurrence of the beneficiaries on account of the valuation not having been made before the sale, and that the title would be forced upon him.—

SALE BY TRUSTEE—*continued.*
Observations on *Rede* v. *Oakes* (4 D. J. & S. 505). Morris *v.* Debenham - - - 540

SATISFACTION—Covenant to give portions 398
See Portions.

SCHEME OF SETTLEMENT—Bankruptcy 424
See Postponed Creditors.

SECURED CREDITOR - - - 485
See Creditor holding Security.

SECURITIES FOR BILLS OF EXCHANGE—*Appropriation of Consignments to meet Bills of Exchange—Agent consigning Goods to his Principal—Passing of Property in Goods—Right to Disposal of Proceeds—Invoice Price—Doctrine of Ex parte Waring.*] A firm of merchants in *England* employed a firm of merchants in *South America* as their agents to purchase goods and send them to *England*. The foreign firm drew bills on the English firm and sold them in *South America*, and with the proceeds purchased goods which they shipped to *England*, sending the bills of lading directly to the English firm, and at the same time advising them of the drawing of the bills, by means of which they had purchased the goods, and requesting them to carry the invoice price of the goods to their account. The English firm went into liquidation, and the foreign firm also became bankrupt. When the English firm stopped payment a cargo of goods was *in transitu*, and some of the bills drawn for purchasing them had been accepted by the English firm, but not paid, and others had not been accepted. The trustee in the liquidation took possession of the cargo on its arrival. The creditors of the foreign firm claimed to have the goods appropriated to meet the bills drawn in respect of them:—*Held* (reversing the decision of *Bacon*, C.J.), that the foreign firm, whether regarded as the agents of the English firm or as vendors, had parted with all property in the goods, and had no power to direct the appropriation of the proceeds; and, therefore, no equity arose on the insolvency of the two firms in favour of the holders of the bills to have the proceeds applied in payment of the bills under the doctrine of *Ex parte Waring* (19 Ves. 345).—*Shepherd* v. *Harrison* (Law Rep. 5 H. L. 116) distinguished.—A direction by consignor to consignee to place the invoice price of goods to his credit and the bills drawn against them to his debit does not amount to an appropriation of the goods to protect the bills. *Ex parte* Banner. *In re* Tappenbeck 278

SECURITY—Promise of - - - 127
See Fraudulent Preference.

—— Receiver—Date of appointment - 291
See Receiver.

—— Valuation of—Proof for balance - 485
See Creditor holding Security.

SECURITY FOR COSTS—*Practice—Appeal—Rules of Court*, 1875, *Order* LVIII., *r.* 15.] A Plaintiff appealed from a decree dismissing his bill. Upon proof of his having no means to answer the costs of an appeal, the appeal was stayed until he made a deposit of £50; but the Court declined to order that in default of his doing so within a given time the appeal should be dismissed. Wilson *v.* Smith - - - - - - 67

2. ——*Practice—Appeal—Rules of Court*, 1875, *Order* LVIII., *r.* 15.] Notice of motion by a Respondent that the Appellant may be directed to give security for the costs of an appeal may be served without leave. Grills *v.* Dillon - 325

3. —— *Appeal—Bond—Costs of Application—Order* LVIII., *r.* 15.] When security for the costs of an appeal was ordered to be given, a bond with sureties was allowed, and the costs of the application were ordered to follow the result of the appeal. Phosphate Sewage Company *v.* Hartmont - - - - - - - 811

4. —— *Company — Winding-up Petition — Opposition by Foreign Shareholders.*] A shareholder of a company who resides out of the jurisdiction and appears to oppose a petition for winding up the company cannot be required to give security for costs. *In re* Percy & Kelly Nickel, Cobalt, and Chrome Iron Mining Company 531

SEPARATE ESTATE OF WIFE—Policy of insurance—Bankruptcy of husband 266
See Married Women's Property Act.

SERVICE—Writ—Absconding Defendant 218, 220
See Substituted Service. 1, 2.

SETTLED ESTATE—Cost of draining and new buildings - - - - - 185
See Management by Trustees.

SETTLED ESTATES ACT (19 & 20 *Vict. c.* 120), *ss.* 14, 23 — *Building Land — Construction of Roads and Sewers—Money to be invested in Land—Act of Parliament — Marginal Notes.*] The Court has no power, under the Leases and Sales of Settled Estates Acts, to charge, mortgage, or sell part of a settled estate in order to raise money for making roads and sewers on building land forming other part of the estate; nor has it power to apply for that purpose money which is liable to be laid out in the purchase of lands to be settled to the same uses as the settled estate.—*Semble*, the marginal notes to an Act of Parliament now form part of the Act, and may be used for the purpose of interpreting it. *In re* Venour's Settled Estates. Venour *v.* Sellon - - - - - - 522

SETTLEMENT — Agreement for — Lien on unsettled property - - - 304
See Agreement for Settlement.

—— Covenant to give portions by will—Satisfaction - - - - 398
See Portions.

—— Covenant to settle - - 363, 706
See Covenant to settle. 1, 2.

—— Divorced husband—Interest of - 318
See Divorced Husband.

—— Infant - - - - - 387
See Infant's Settlement.

—— Marriage—In pursuance of articles - 44
See Executory Settlement.

—— Survivorship—Death of husband and wife at same time - - - - 213
See Presumption of Death.

—— Voluntary - - - - - 54
See Voluntary Settlement.

SHAREHOLDER — Foreign — Opposing winding-up petition - - - - 531
See Security for Costs. 4.

SHARES—Lien on—Power to refuse transfer 101
See TRANSFER OF SHARES.
—— Sale of—Custom of *Stock Exchange* - 594
See CUSTOM OF STOCK EXCHANGE.
—— Transfer of - - - - 101
See TRANSFER OF SHARES.

SOLICITOR—Costs of—Composition—Taxation
See BANKRUPTCY JURISDICTION. [430
—— Liquidating debtor—Costs - - 320
See COSTS OF LIQUIDATION.
—— Mortgagee in possession - - 148
See MORTGAGEE IN POSSESSION.

SPECIAL EXAMINER—*Practice—Taking down Depositions—Certificate of Examiner—Rules of Court*, 1875, *Order* XXXVII., *r.* 4—15 & 16 *Vict.* c. 86, *s.* 32.] A witness's depositions, *de bene esse*, not taken down by the examiner, specially appointed, in his own handwriting, as directed by the 15 & 16 Vict. c. 86, s. 32, but taken down in the presence of the other parties and certified by the examiner to have been read over to the witness, and signed by her in his presence, were, under Rules of Court, 1875, Order XXXVII., rule 4, ordered to be filed. BOLTON *v.* BOLTON [217
—— Winding-up — Compulsory attendance of witness - - - - 575
See WITNESS IN WINDING-UP.

SPECIFIC PERFORMANCE—Relief against third party - - - - - 721
See CITATION OF THIRD PARTY. 2.
—— Sale by trustee—Concurrence of *cestui que trust* — Apportionment of purchase-money - - - - 540
See SALE BY TRUSTEE.

SPECIFICATION OF PATENT — *Infringement of Patent—Prior User—Anticipation—Disqualification of Plaintiff from being a Patentee.*] Under an Act of Parliament three referees were appointed by the Board of Trade to inspect the gas works of the metropolis, to report upon the impurities in the gas, and to fix a maximum of impurities to be allowed; and the gas companies were bound to give them every facility in the discharge of their duties.—One of the referees took out a patent for improvements in the purification of gas, claiming (*inter alia*) a method of employing lime purifiers, whereby the contents of the purifiers might be converted into sulphide of calcium, for the purpose of purifying the gas from certain compounds of sulphur with which sulphide of calcium combines.—Before the patent was taken out, the Defendant company had been in the habit of using lime purifiers, by which sulphide of calcium had been produced, but they had not succeeded in attaining the desired purity on account of their failing to extract from the gas the whole of the carbonic acid contained in it, which impeded the operation of the sulphide of calcium in the purifiers. The Plaintiff's invention mainly consisted in keeping a fresher supply of lime in the first series of purifiers, so as completely to eliminate the carbonic acid from the gas before it was passed on to the subsequent purifiers, in which the sulphide of calcium was produced. The principle of this improvement was indicated in the last report of the referees, but the report was not published till after the date of the patent:

SPECIFICATION OF PATENT—*continued.*
—*Held* (reversing the decision of *Bacon*, V.C.), that the Plaintiff's invention only amounted to an instruction for the more efficient working of a known process, and was not a proper subject for a patent, and the Plaintiff's bill was dismissed.—Whether it is competent for a member of an official commission to take out a patent for the results of his official investigation, *quære*. PATTERSON *v.* GASLIGHT AND COKE COMPANY - 812

STATEMENT OF DEBTS—Sufficiency of—Resolution for liquidation - - 326
See RESOLUTION FOR LIQUIDATION. 2.

STATUTE—Marginal notes - - - 522
See SETTLED ESTATES ACT.

STATUTES:
13 Eliz. c. 5—*Fraudulent Conveyances* - 104
See FRAUDULENT CONVEYANCE.
21 Jac. 1, c. 16—*Limitations* - - 617
See LIMITATIONS, STATUTE OF. 1.
9 Geo. 2, c. 36—*Mortmain* - - 222
See MORTMAIN.
11 Geo. 4 & 1 Will. 4, c. 65—*Settled Estates* 719
See LEASE UNDER 1 WILL. 4, c. 6.
3 & 4 Will. 4, c. 27, s. 42—*Limitations* 617, 713
See LIMITATIONS, STATUTE OF. 1, 2.
3 & 4 Will. 4, c. 42, s. 3—*Amendment of Law*
See LIMITATIONS, STATUTE OF. 1. [713
3 & 4 Will. 4, c. 74, s. 21—*Fines and Recoveries* - - - - 61
See LUNATIC TENANT IN TAIL.
8 Vict. c. 18, ss. 63, 68—*Lands Clauses* 201, 235
See COMPENSATION UNDER RAILWAYS CLAUSES ACT. 1, 2.
—— —— s. 69 - - - 225, 690
See REINVESTMENT OF PURCHASE-MONEY. 1, 2.
8 Vict. c. 20, ss. 78, 81—*Railways Clauses* 201, [235
See COMPENSATION UNDER RAILWAYS CLAUSES ACT. 1, 2.
11 & 12 Vict. c. 63, s. 74 - - - 634
See ORNAMENTAL GARDEN.
13 & 14 Vict. c. 60, ss. 32, 34—*Trustee Act* 483
See TRUSTEE ACTS. 2.
15 & 16 Vict. c. 86, s. 32—*Chancery Improvement* - - - - - 217
See SPECIAL EXAMINER.
—— —— s. 38 - - - - 127
See PROSECUTION OF PENDING PROCEEDINGS. 1.
—— —— s. 55 - - - - 409
See PETITION FOR SALE.
16 & 17 Vict. c. 70, s. 116—*Lunacy Regulation*
See LUNATIC TENANT IN TAIL. [61
17 & 18 Vict, c. 36, s. 1—*Bills of Sale* - 291
See REGISTRATION OF BILL OF SALE.
19 & 20 Vict. c. 120, ss. 14, 23—*Settled Estates*
See SETTLED ESTATES ACT. [522
20 & 21 Vict. c. 85, s. 33—*Divorce Court* - 22
See PETITION FOR ADJUDICATION.
24 & 25 Vict. c. 134, ss. 90, 232—*Bankruptcy* 9
See DEBTOR'S SUMMONS. 1.
—— —— s. 110 - - - - 806
See SUSPENSION OF BANKRUPTCY.

STATUTES—*continued.*

25 & 26 Vict. c. 89, ss. 6, 18—*Companies* 610
See Winding-up Petition. 2.
—— —— s. 43 - - - 337, 345
See Debenture. 1, 2.
—— —— ss. 80, 86, 91 - - - 116
See Winding-up Petition. 1.
—— —— s. 115 - - - - 575
See Witness in Winding-up.
—— —— s. 133, sub-s. 6 - - 366
See Liquidator.
—— —— s. 165 - - - - 1
See Fiduciary Relation. 1.
—— —— s. 199 - - - - 763
See Winding-up Petition. 3.
25 & 26 Vict. c. 102, s. 85—*Metropolis Management Act* - - - - 165
See Light and Air.
32 & 33 Vict. c. 62, ss. 11, 16, 17—*Debtors' Act* [786, 799
See Prosecution of Bankrupt. 1, 2.
32 & 33 Vict. c. 71, ss. 6, 7—*Bankruptcy* 423
See Debtor's Summons. 2.
—— —— ss. 14, 55 - - - 749
See Trustee in Bankruptcy.
—— —— ss. 23, 24 - - - 802
See Disclaimer.
—— —— s. 28 - - - - 424
See Postponed Creditors.
—— —— ss. 30, 125, sub-ss. 7, 9 - 57
See Trustee in Liquidation.
—— —— ss. 59, 65, 71, 72 - - 72
See Issues in Bankruptcy.
—— —— s. 71 - - - 229, 797
See Bankruptcy Appeal. 1, 2.
—— —— —— - - - - 786, 799
See Prosecution of Bankrupt. 1, 2.
—— —— —— - - - - 749
See Rehearing in Bankruptcy.
—— —— s. 72 - - - - 51
See Citation of Third Party. 1.
—— —— ss. 72, 126 - - - 430
See Bankruptcy Jurisdiction.
—— —— s. 83, sub-ss. 2, 8 - - 172
See Joint and Separate Estates.
—— —— s. 91 - - - - 266
See Married Women's Property Act.
—— —— —— - - - - 54
See Voluntary Settlement.
—— —— s. 118 - - - - 9
See Debtor's Summons. 1.
—— —— s. 125 - - - 231, 326
See Resolution for Liquidation. 1, 2.
—— —— s. 126 - - - - 63
See Injunction in Bankruptcy.
—— —— —— - - - - 485
See Creditor holding Security.
—— —— —— - - - - 323
See Resolution for Composition.
33 & 34 Vict. c. 93, s. 10—*Married Women's Property* - - - - 266
See Married Women's Property Act.
36 & 37 Vict. c. 50, s. 1—*Places of Worship Sites Act* - - - - - 29
See Places of Worship Sites Act.

STATUTES—*continued.*

36 & 37 Vict. c. 66, s. 22—*Judicature Act* 586
See Prosecution of pending Proceedings. 2.
—— —— s. 24 - - - - 148
See Mortgagee in Possession.
—— —— —— sub-s. 3 - - 223, 736
See Counter-claim. 1, 2.
—— —— s. 25, sub-s. 8 - - - 302
See Receiver. 3.
—— —— ss. 29, 30, 37, 42, 43 - - 746
See Trial by Jury.
—— —— s. 49 - - - - 69
See Appeal for Costs.
—— —— s. 57 - - - - 588
See Prosecution of pending Proceedings. 3.
—— —— s. 66 - - - - 608
See District Registrar.
37 & 38 Vict. c. 62—*Infants* - - 227
See Infant Trader.

STAYING PROCEEDINGS — *Practice — Appeal—Staying Execution—Payment of Costs—Rules of Court*, 1875, *Order* LVIII., *rr.* 16, 17.] An appeal was brought by a Defendant from a decree which, *inter alia*, ordered him to pay costs. On motion to stay proceedings pending the appeal, order made on payment into Court by the Defendant of the costs below and on payment of the costs of the application to stay.—A motion before the Court of Appeal under Rules of Court, 1875, Order LVIII., rule 17, is not an appeal but an original motion.—The rule in *Merry* v. *Nickalls* (Law Rep. 8 Ch. 205) is still in force. Cooper *v.* Cooper - - - - - 492

2. —— *Jurisdiction — Chancery or Bankruptcy—Composition Deed—Body of Creditors not interested—Rules of Court*, 1875, *Order* XXXIV., *r.* 2; *Order* XL., *r.* 11.] A composition deed, by which all the creditors of a debtor agreed to accept a composition of 7*s.* 6*d.* in the pound on the amount of and in full discharge of their debts was duly executed by all the creditors and registered under the *Bankruptcy Act*, 1861, and all the property of the debtor was assigned to a trustee to provide for the composition. The payment of part of one of the debts to which the Plaintiffs were now entitled was afterwards agreed to be postponed till all the other creditors had received their composition in full, and the entire estate then available was distributed in paying the composition on all the debts except the portion of the Plaintiffs which was postponed. Some years elapsed, and it was then discovered that there was some real estate at *Monte Video* which had become vested in the trustee of the composition deed, and had remained unadministered, and the Plaintiffs instituted the present suit in the Chancery Division to have this property realized with a view to payment of the balance still due:—*Held*, on motion by the trustee of the composition deed to have the proceedings stayed on the ground that the case ought to be dealt with by the Court of Bankruptcy, that the Chancery Division had at least concurrent jurisdiction, and that the fact that there was no body of creditors amongst whom a fund was to be distributed was a circumstance which made it expedient to exercise that jurisdic-

STAYING PROCEEDINGS—*continued.*
tion:—*Held*, further, that the fact of the deed containing a clause which made it doubtful whether it came within the provisions of the 192nd and 197th sections of the *Bankruptcy Act*, 1861, would of itself be a strong ground for not compelling the parties to go to the Court of Bankruptcy. Jenney *v.* Bell - - - 547

STOCK EXCHANGE—Sale by jobber—Custom of *See* Custom of Stock Exchange. [594

SUBSTITUTED SERVICE—*Practice—Judicature Acts—Service of Writ—Substituted or other Service—Rules of Court*, 1875, *Order* ix., *r.* 2.] The provision for "substitution of notice for service" in the latter part of the 2nd rule of Order ix. of the Rules of Court, 1875, does not apply to an ordinary case of an absconding Defendant within the jurisdiction. In such a case service of the writ was ordered to be effected by leaving a copy of it at the lodgings last occupied by the Defendant and at the place where his business was being carried on; and advertisements were directed to be inserted in the *London Gazette* and the *Times*; but the Court declined to make any special order varying the ordinary eight days' time usually fixed by the writ for the appearance of the Defendant. Cook *v.* Dey - - - 218

2. —— *Practice—Judicature Acts—Service of Writ—Rules of Court*, 1875, *Order* ix., *r.* 2.] Service of the writ in an action to recover possession of leasehold houses against an absconding Defendant, who had given the tenants notice to pay their rents to him, directed to be effected by leaving a copy of the writ at each of the houses, and by advertising in the *London Gazette* and the *Times*.—In such a case the ordinary eight days' time will run from service of the copy of the writ and issue of the advertisements.—Form of order. Crane *v.* Jullion - - - - 220

SUMMONS—Production of documents - 140
See Production of Documents. 1.

SUPPORT—Mines under railway - - 235
See Compensation under Railways Clauses Act. 2.

SURRENDER OF LEASE—*Forfeiture—Underlessee.*] Where a lessor re-enters on a forfeiture the rights of under-lessees are gone, but where a lessor accepts a surrender from a lessee the rights of the under-lessees remain although the lessee was at the time liable to forfeiture.—Decree of *Hall*, V.C., reversed. Great Western Railway Company *v.* Smith - - - - 235

SURVIVING LIQUIDATOR - - - 366
See Liquidator.

SURVIVORSHIP—*Will—Construction—"Other."*] A testator gave the residue of his property to trustees, on trust to pay and divide the income equally among his three children, during their respective lives, and after the death of each child the share of the fund to the income of which the deceased child was entitled for life was to be in trust for his or her issue. And in case, and so often as, any of the three children should die without leaving issue, the share to which such child should become entitled during his or her life, as well originally as by survivorship or accruer, was to be in trust for the survivors or survivor of the children, during their, his, or her respective life or lives, and in equal shares if more than one. And, after the decease of each such survivor, the surviving or accruing share, to which such survivor for the time being should become entitled for his or her life, was to be in trust for his or her issue. And, in case all the testator's children should die without leaving issue, the fund was to be in trust for the representatives of the survivor.—After the death of the testator one of his children died without issue, then another child died leaving issue, and, lastly, the third child died without issue:—*Held*, that the issue of the second child, though she was not the survivor, became entitled on the death of the third to the whole of the fund.—Decision of *Hall*, V.C., affirmed.—*Waite* v. *Littlewood* (Law Rep. 8 Ch. 70) and *Badger* v. *Gregory* (Law Rep. 8 Eq. 78) followed. Wake *v.* Varah - 348

—— Presumption of settled funds - - 213
See Presumption of Death.

SUSPENSION OF BANKRUPTCY—*Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134, *s.* 110)—*After-acquired Property—Notice by Assignee—Withdrawal of Notice—Right of uncertificated Bankrupt to sue out Debtor's Summons.*] A resolution suspending bankruptcy proceedings under the 110th section of the *Bankruptcy Act*, 1861, does not take from the assignee his right to the after-acquired property of the bankrupt; and until the bankrupt has obtained his discharge, the assignee can at any time claim such property.—A bankrupt whose creditors had agreed to a resolution suspending his bankruptcy, but who had never obtained his discharge, recovered judgment in an action against *C.* for £500. The assignee gave notice to *C.* of the bankruptcy, and claimed the money recovered. Afterwards an arrangement having been come to between the assignee and the bankrupt, the bankrupt, without any interference by the assignee, sued out a debtor's summons against *C.* for the judgment debt:—*Held*, that the debtor's summons could not be supported.—Whether the claim having been once made by the assignee could be withdrawn, *quære*. *Ex parte* Carter. *In re* Carter - - 806

TACKING—Arrears of interest - - 713
See Limitations, Statute of. 2.

TAXATION OF COSTS—Composition with creditors - - - - - 450
See Bankruptcy Jurisdiction.

TENANT FOR LIFE—Infant—Sale of heirlooms
See Heirlooms. [711

—— Keeping down interest - - 199
See Adjustment of Accounts.

—— Places of Worship Sites Act—Consent as guardian - - - - 29
See Places of Worship Sites Act.

TENANT IN TAIL—Lunatic - - 61
See Lunatic Tenant in Tail.

TIME—Appeal—Bankruptcy—Rehearing 749
See Rehearing in Bankruptcy.

—— Extension of—Defence - - 112
See Demurrer. 1.

—— Extension of—Disclaimer by trustee in bankruptcy - - - - 802
See Disclaimer.

TRADE—Custom of - - - - 489
See Custom of Trade.

TRADE-MARK—*Trade Name—Improper use—Fraud—Injunction.*] When a manufacturer *A.* has acquired a reputation in the market, so that the goods made by him are commonly known by his name, but is not possessed of any patent, a rival manufacturer *B.*, being entitled to imitate *A.'s* goods, is entitled also, provided that he does not place *A.'s* name on his own goods, to advertise his goods and offer them for sale by the name of *A.*, if he takes care to state clearly at the same time that the goods which he sells are manufactured by himself.—Thus the Plaintiffs, the *Singer Manufacturing Company*, having acquired a great reputation as makers of sewing machines, their machines being commonly called "*Singer*" Machines, the Defendant was held to be entitled to advertise for sale his own machines as "*Singer*" Machines, his advertisements always stating that the machines which he sold were manufactured by himself, and the word "*Singer*" not being placed upon his machines. Singer Manufacturing Company *v.* Wilson - - - - - 434

TRADE NAME—"Singer Machine" - 434
See Trade-mark.

TRADER—Infant—Bankruptcy - - 227
See Infant Trader.

TRANSFER OF SHARES—*Company—Articles of Association—Lien on Shares—Power to refuse Transfer—"Due"—"Indebted."*] By the articles of association of a company it was provided (Art. 7) that the company should have a first and paramount lien upon all shares of any member for any money due to the company from him alone or jointly with any other person, with power to sell the shares and apply the proceeds in or towards discharge of such debts; and (Art. 16) that the company might decline to register any transfer of shares whilst the member making the transfer was, either alone or jointly with any other person, indebted to the company on any account whatever:—*Held*, that the 7th and 16th articles related to the same subject-matter, and that the company could only refuse under Art. 16 to register a transfer in cases where they were entitled to a lien under the 7th article.—*Held*, also, that the word "due" in the 7th article meant due and payable; and that the word "indebted" in the 16th article had a similar signification. *In re* Stockton Malleable Iron Company - 101

—— Custom of Stock Exchange - - 594
See Custom of Stock Exchange.

TRIAL BY JURY—*Creditor's Suit prior to 1st November, 1875—Disputed Claim—Issue joined after 1st November, 1875—Judicature Act, 1873, ss. 29, 30, 37, 42, 43—Rules of Court, 1875, Order xxvi.; Order xxxvi., rr, 1, 3, 8, 16, 27, 29—Course of Procedure.*] The Plaintiff's claim in a suit for administration instituted prior to the 1st of November, 1875, having been disputed, he, after issue joined subsequently to the 1st of November, 1875, gave notice of trial with a jury in *Middlesex*, but subsequently intimated to the Defendant that the trial would be before the Judge only, and the case was set down for hearing. The Defendant having claimed to have a jury:—*Held*, that, under Rules of Court, 1875, Order xxxvi., rule 3, the

TRIAL BY JURY—*continued.*
Defendant had the right which he claimed: and that where the case was of a nature fit to be tried by a jury, the right should not ordinarily be interfered with by the exercise of the discretion given to the Court by rule 26.—Actions in the Chancery Division for trial with a jury are to be set down in *Middlesex*, unless in the statement of claim, or under Order xxxvi., rule 1, the place or county be named.—Under Order xxxvi., rules 27 and 29, a Judge of the Chancery Division can in any case direct issues to be tried by a Judge with a jury at the assizes, or at the sittings in *London* or *Middlesex*.—A Judge of the Chancery Division cannot, having regard to the *Judicature Act*, 1873, ss. 29, 30, 37, and 42, try a case with a jury. Clarke *v.* Cookson - - - - 746

—— Order for—Irregularity—Waiver - 72
See Issues in Bankruptcy.

TRUST—Declaration of—Preference of creditors
See Fraudulent Conveyance. [104

TRUST FOR SALE—Devise—Uncompleted purchase - - - - 499
See Devise of Trust Estates.

TRUSTEE—Appointment of new—Trustee Act 70
See Trustee Acts. 1.

—— Bankrupt estate - - - 749
See Trustee in Bankruptcy.

—— Charity scheme - - - 554
See Charity Scheme.

—— For sale—Concurrence of *cestui que trust*
See Sale by Trustee. [540

—— In bankruptcy - - - - 749
See Trustee in Bankruptcy.

—— In bankruptcy—Disclaimer by - 802
See Disclaimer.

—— In liquidation - - - - 57
See Trustee in Liquidation.

—— In liquidation—Resignation of—Power of new trustee - - - - 172
See Joint and Separate Estates.

—— Leaseholds—Vesting order - - 483
See Trustee Acts. 2.

—— Management by—Costs of draining and new buildings - - - - 185
See Management by Trustees.

—— Purchase of trust estate - - 190
See Fiduciary Relation. 2.

TRUSTEE ACTS — *Practice — Costs — Lunatic Trustee and Mortgagee — Reconveyance of Mortgaged Estate—Person appointed to convey.*] Property was mortgaged to two trustees of a settlement. The mortgagor had no notice of the trust. One trustee died, and the survivor became a lunatic. New trustees of the settlement were appointed under a power, but the mortgage debt was not transferred to them. The mortgagor gave notice to pay off the money. A petition was presented, asking that the new trustees might be appointed to reconvey the mortgaged property to the mortgagor on payment of the mortgage money:—*Held*, that the costs of the petition must be paid out of the trust funds. *In re* Jones 70

2. —— *New Trustee—Vesting Order—Leaseholds—No Personal Representative*—13 & 14 *Vict. c.* 60, *ss.* 32, 34.] Where the proving executors

TRUSTEE ACTS—*continued.*
of the last surviving trustee and executor of a will were dead, the Court, having appointed new trustees of the will, made an order vesting in the new trustees the leaseholds of the original testator for all the estate therein of the last surviving trustee and executor.—*In re Dalgleish's Settlement* (1 Ch. D. 46) overruled. *In re* RATHBONE 483

TRUSTEE IN BANKRUPTCY—*Failure to perform Duties—Report of Comptroller—Disallowance of Remuneration voted by Creditors—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 14, 55—*Bankruptcy Rules*, 1870, *rr.* 121, 243, 246, 247, 251.] When the Comptroller in Bankruptcy has reported to the Court that a trustee has failed to perform the duties imposed on him by the Act and the Rules, the Court has power to disallow the trustee the remuneration which has been voted to him by the creditors. *Ex parte* SIMMONS. *In re* LISTER 749

TRUSTEE IN LIQUIDATION—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 30; *s.* 125, *sub-ss.* 7, 9—*Moneys kept in the Hands of Trustee.*] *Held* (affirming the decision of the Registrar), that sect. 30 of the *Bankruptcy Act*, 1869, charging a trustee with interest at £20 per cent. per annum upon the excess above £50 of any moneys retained in his hands for more than ten days, does not apply to a trustee under a liquidation. *Ex parte* BROOKER. *In re* FASTNEDGE - - - - 57

UNCERTIFICATED BANKRUPT—After-acquired property—Right to take out debtor's summons - - - - 806
See SUSPENSION OF BANKRUPTCY.

UNDERLEASE—Effect on, of forfeiture or surrender of lease - - - 235
See SURRENDER OF LEASE.

UNLIMITED ASSURANCE COMPANY—Marshalling assets - - - - 476
See MARSHALLING.

UNREGISTERED BILL OF SALE—Notice of 291
See REGISTRATION OF BILL OF SALE.

UNREGISTERED COMPANY—Winding-up petition - - - - - 763
See WINDING-UP PETITION. 3.

UNSOUND MIND—Person of—Guardian and maintenance - - - 124
See GUARDIAN.

VENDOR AND PURCHASER—Death of vendor before completion - - - 499
See DEVISE OF TRUST ESTATES.

—— Sale by trustee—Concurrence of *cestui que trust* - - - - - 540
See SALE BY TRUSTEE.

—— Sale of trust estate - - - 190
See FIDUCIARY RELATION. 2.

—— Specific performance—Relief against third party - - - - 721
See CITATION OF THIRD PARTY. 2.

VERDICT—Power to disregard issues in bankruptcy - - - - 72
See ISSUES IN BANKRUPTCY.

VESTING—Gift on attaining twenty-one 753, 783
See GIFT ON ATTAINING TWENTY-ONE. 1, 2.

VESTING ORDER—Trustee Act - - 483
See TRUSTEE ACTS. 2.

VOLUNTARY SETTLEMENT—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 91.] A person made a voluntary settlement of an estate which was subject to a mortgage, and covenanted with the trustees of the settlement that he would pay the interest on the mortgage, and, when required, would pay off the principal. His assets, exclusive of the mortgaged estate, were sufficient to pay his debts other than the mortgage debt, but not sufficient to pay both. He afterwards became bankrupt:—*Held* (reversing the decision of the Chief Judge), that the settlement was void as against the trustee in bankruptcy, under the *Bankruptcy Act*, 1869, s. 91. *Ex parte* HUXTABLE. *In re* CONIBEER - - - - 54

VOLUNTARY WINDING UP—Appointment of receiver and manager - - 726
See RECEIVER. 4.

WAIVER—Time for disclaimer by trustee in bankruptcy - - - - 802
See DISCLAIMER.

WARING, EX PARTE (19 Ves. 345)—Doctrine of [273
See SECURITIES FOR BILLS OF EXCHANGE.

WILD'S CASE—Rule in - - - 494
See RULE IN WILD'S CASE.

WILFUL DEFAULT—Mortgagee in possession [148
See MORTGAGEE IN POSSESSION.

WILL—Bequest of debt to executor - 420
See RETAINER BY EXECUTOR.

—— Contingent remainder - - - 417
See CONTINGENT REMAINDER.

—— Covenant to give portions by will—Satisfaction - - - - - 398
See PORTIONS.

—— Devise of trust estates - - 499
See DEVISE OF TRUST ESTATES.

—— Executory devise - - - 417
See CONTINGENT REMAINDER.

—— Gift on attaining twenty-one - 753, 783
See GIFT ON ATTAINING TWENTY-ONE. 1, 2.

—— Gift over on second marriage - 494
See RULE IN WILD'S CASE.

—— Gift to children and issue—Rule in *Wild's Case* - - - - - 494
See RULE IN WILD'S CASE.

—— Implied gift to children of daughter - 413
See GIFT BY IMPLICATION.

—— Legacy charged on land - - 177
See LEGACY CHARGED ON LAND.

—— Mortmain - - - - 222
See MORTMAIN.

—— "Other effects" - - - - 122
See RESIDUARY GIFT. 1.

—— Residuary gift - - - 122, 628
See RESIDUARY GIFT. 1, 2.

—— "Survivor"—"Other" - - - 343
See SURVIVORSHIP.

WINDING-UP—Agent of company—Fiduciary relation - - - - - 1
See FIDUCIARY RELATION. 1.

—— Marshalling assets - - 476
See MARSHALLING.

WINDING-UP—*continued.*
—— Official liquidator - - - 181
See OFFICIAL LIQUIDATOR.
—— Petition for - - - 116, 610, 763
See WINDING-UP PETITION. 1, 2, 3.
—— Petition—Opposing shareholder—Security for costs - - - - 531
See SECURITY FOR COSTS. 4.
—— Receiver and manager - - - 726
See RECEIVER. 4.
—— Voluntary—Powers of liquidator - 366
See LIQUIDATOR.

WINDING-UP PETITION — *Company — Winding-up—Creditors' Petition—Discretion of Court — Petition directed to stand over — Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 80, 86, 91.] A company was formed to repair and work a floating dock in the *West Indies*. The dock was not finished until December, 1875. At that time the whole capital of the company had been paid up in full, and debentures issued to the amount of £89,000, secured by a charge on the dock and certain concessions, constituting the only assets of the company. The interest on these debentures having fallen into arrear, a holder of a small amount served in December, 1875, the statutory notice to pay the interest, and then presented a petition to wind up the company. The petition was opposed by the company, by debenture holders to the amount of upwards of £70,000, and by the principal unsecured creditor, whose debt amounted to £5000; and there was no evidence that the sale of the dock and concessions would produce any surplus beyond the amount of the debentures:—*Held*, that the petition must stand over for six months, upon the company undertaking not to consent to a winding-up order on another petition, or to wind up voluntarily, to give the Petitioner notice of the presentation of any other petition, and not to raise any objection to the petition being brought on in case any other petition should be presented. *In re* ST. THOMAS' DOCK COMPANY - - 116

2. —— *Company offered to be wound up—Memorandum of Association—Certificate of Registration—One of the Seven Subscribers an Infant—Companies Act*, 1862, *ss.* 6, 18—*Practice.*] Under the *Companies Act*, 1862, a company was in November, 1873, registered, but it did not commence business within a year afterwards. The Registrar certified that the memorandum of association had been subscribed by seven persons. The company was, in July, 1875, ordered to be wound up. On the proceedings before the Chief Clerk it was discovered that one of the seven persons was an infant at the time of registration; and as the Chief Clerk expressed a doubt whether he could proceed, the petition was presented by creditors, praying that the company might be ordered to be wound up as an unregistered company:—*Held*, that, under the 6th and 18th sections of the *Companies Act*, 1862, there having been a certificate of registration, the winding-up order was valid:—*Held*, also, that the proper course would have been to have brought the question before the Judge in Chambers, and that as the petition had been improperly presented, it must be dismissed with costs. *In re* NASSAU PHOSPHATE COMPANY - 610

WINDING-UP PETITION—*continued.*

3. —— *Companies Act*, 1862, *ss.* 4, 199—*Winding-up — Unregistered Company of more than Twenty Members.*] A company for establishing a service of steamers was formed in 1871 with more than twenty members, and was not registered. In 1873 it made over its assets and liabilities to a limited company, which was unsuccessful, and passed a resolution for winding up. The solicitors who had acted for the unregistered company sent in a bill consisting of costs incurred about the formation of that company, costs incurred in defending actions brought against some of the members which the solicitors were retained by the manager and committee of the company to defend, and other costs for work done in the carrying on of the company on the like retainer:—*Held* (affirming the decision of *Malins*, V.C.), that the solicitors could not obtain an order to wind up the company, for that, as the company was illegal, no legal debt arose in respect of that part of their demand which related to the formation of the company, or was immediately connected with carrying it on; and, as to the rest, the solicitors could not shew that they were retained on behalf of all the members except by producing a deed of settlement, which was on the face of it illegal. Whether an order can be made for winding up such an illegal association on the application either of members or creditors, *quære*. *In re* SOUTH WALES ATLANTIC STEAMSHIP COMPANY - - 763

WITHDRAWAL—Notice of claim by assignee of uncertificated bankrupt - - 806
See SUSPENSION OF BANKRUPTCY.
—— Offer to sell - - - - 463
See ACCEPTANCE OF OFFER.

WITNESS IN WINDING-UP—*Special Examiner—Companies Act*, 1862, *s.* 115—*Compulsory Attendance of Witnesses.*—*Held*, that a witness having been ordered to attend and give evidence before a special examiner appointed with his consent, under the *Companies Act*, 1862, s. 115, and having attended several times in pursuance of such order, could not refuse to continue giving his evidence on the ground that his deposition might be used against him in a pending action commenced before the appointment of the special examiner. *In re* LISBON STEAM TRAMWAYS COMPANY - 575

WORDS—"Due" - - - - 101
See TRANSFER OF SHARES.
—— "Indebted" - - - - 101
See TRANSFER OF SHARES.
—— "Other effects" - - - 122
See RESIDUARY GIFT. 1.
—— "Passing of Act" - - - 9
See DEBTOR'S SUMMONS. 1.
—— "Survivor" - - - - 348
See SURVIVORSHIP.
WRIT—Amendment of - - - 221
See AMENDMENT OF PLEADINGS.
—— Service—Absconding Defendant 218, 220
See SUBSTITUTED SERVICE. 1, 2.

LONDON: PRINTED BY WILLIAM CLOWES AND SONS, STAMFORD STREET AND CHARING CROSS.

BIBL. LONDIN. UNIV.

DUE 23 JUL 1975